(1)

No. 88-1943-CFX
Status: GRANTED

Title: Office of Personnel Management, Petitioner
v.
Charles Richmond

Docketed:
June 2, 1989

Court: United States Court of Appeals for the Federal Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Richmond,Charles, DeFord,Gill

Entry	Date	Note	Proceedings and Orders
1	Apr 21 1989	G	Application (A88-850) to extend the time to file a petition for a writ of certiorari from May 4, 1989 to June 19, 1989, submitted to The Chief Justice.
2	Apr 25 1989		Application (A88-850) granted by the Chief Justice extending the time to file until June 3, 1989.
3	Jun 2 1989	G	Petition for writ of certiorari filed.
4	Jul 5 1989		DISTRIBUTED. September 25, 1989
5	Aug 2 1989	P	Response requested -- TM. (Due September 1, 1989)
6	Sep 1 1989	X	Brief of respondent Charles Richmond in opposition filed.
7	Sep 19 1989	X	Reply brief of petitioner Office of Personnel Management filed.
8	Oct 2 1989		Petition GRANTED.
			**********
9	Oct 12 1989		Record filed.
		*	Certified copy of original record received.
11	Oct 24 1989		Order extending time to file brief of petitioner on the merits until November 27, 1989.
12	Oct 24 1989	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
13	Nov 6 1989		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
15	Nov 27 1989		Brief of petitioner Office of Personnel Management filed.
17	Dec 13 1989		Order extending time to file brief of respondent on the merits until January 12, 1990.
18	Jan 5 1990		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 21, 1990. (3RD CASE)
19	Jan 11 1990		Brief of respondent Charles Richmond filed.
20	Jan 17 1990		CIRCULATED.
21	Feb 13 1990	X	Reply brief of petitioner Office of Personnel Management filed.
22	Feb 13 1990		Lodging received.
23	Feb 21 1990		ARGUED.

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88-1943

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

CHARLES RICHMOND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether the Office of Personnel Management can be equitably estopped from applying the requirements of 5 U.S.C. 8337(d), which mandate discontinuance of a disability annuity when the annuitant's earned income exceeds the maximum amount allowed under the statute.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

CHARLES RICHMOND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the Office of Personnel Management, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 862 F.2d 294. The decision of the Merit Systems Protection Board's administrative judge (App., *infra*, 20a-24a) and the denial of review by the Board (App., *infra*, 32a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 30a) was entered on December 2, 1988. A timely petition for rehearing was denied on February 3, 1989 (App., *infra*, 31a). On April 25, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and in-

cluding June 3, 1989. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 8337(d) of Title 5, United States Code, as amended by Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 302(a), 96 Stat. 792, provides:

> If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, recovers from his disability, payment of the annuity terminates on reemployment by the Government or 1 year after the date of the medical examination showing the recovery, whichever is earlier. If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, is restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement, payment of the annuity terminates on reemployment by the Government or 180 days after the end of the calendar year in which earning capacity is so restored, whichever is earlier. Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

STATEMENT

The Court of Appeals for the Federal Circuit in this case estopped the Office of Personnel Management (OPM) from applying the terms of 5 U.S.C. 8337(d). That Section provides that a disability annuitant who earns more than a certain statutory limit on income in any one year is deemed restored to "earning capacity," and therefore loses his or her disability annuity. In 1986, respondent earned more

than the statutory limit, and OPM discontinued his annuity. The court of appeals ordered the payments withheld to be released because two Navy employees incorrectly had told the respondent that his disability annuity would not be discontinued unless he earned more than the statutory limit during *two* consecutive years, and also had given the respondent an outdated circular reflecting the incorrect information. The court ruled that this behavior constituted sufficient "affirmative misconduct" to warrant an exception to the general rule that the government may not be estopped from enforcing the laws.

1. Congress has provided that federal employees who complete at least five years of service and become disabled may retire and receive a disability annuity. 5 U.S.C. 8337(a) (Supp. IV 1986). If an annuitant under 60 years of age recovers from a disability, or is "restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement," the annuity terminates. 5 U.S.C. 8337(d).

An individual is deemed restored to "earning capacity" if his or her wages for a given period of time exceed a specified statutory cap. Prior to 1982, the statute provided that an individual retired for disability was deemed "restored to earning capacity," and thus no longer eligible for a disability annuity, if

> *in each of 2 succeeding calandar years* the income of the annuitant from wages or self-employment * * * equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

5 U.S.C. 8337(d) (1976 ed.) (emphasis added).

The provision was amended in 1982 by the Omnibus Budget Reconciliation Act, Pub. L. No. 97-253, § 302(a)(1), 96 Stat. 792, to provide that if the statutory

cap on earnings is exceeded in any one year, the annuity is to be terminated:

> Earning capacity is deemed restored if *in any calendar year* the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

5 U.S.C. 8337(d) (emphasis added).

2. Respondent retired from his position as a welder with the Navy in 1981, after OPM had approved his application for disability retirement. In January 1986, respondent asked a Navy Employee Relations Specialist at the Navy Public Works Center in San Diego, California, for information about how much he could earn without exceeding the statutory limit. The Specialist erroneously told respondent about the provisions of the pre-1982 version of Section 8337(d)—that his annuity would not be discontinued unless, in each of two succeeding years, he earned at least 80 percent of the current rate of pay for the position he held prior to retirement. App., *infra*, 2a. The Specialist also gave respondent a copy of Federal Personnel Manual Letter No. 831-64 (1981), a publication of the Office of Personnel Management that, while correct when written, was out-of-date. It too explained the two-year rule of the pre-1982 statute. App., *infra*, 2a & n.4. In January 1987, respondent again went to the Navy seeking advice on earnings. Another Employee Relations Specialist erroneously gave respondent the same incorrect information.

3. From 1982 through 1986, respondent earned an average of $12,494 by working as a school bus driver. App., *infra*, 21a. Based on the erroneous information he received from the Navy and the OPM circular, respondent, in the year 1986, earned $19,936—more than the

amount permitted by statute.[1] *Ibid.* As a result, OPM discontinued his annuity as of June 30, 1987. App., *infra*, 25a-29a. However, because respondent earned less than the statutory cap on earnings in 1987, his disability annuity was restored as of January 1, 1988. Respondent, therefore, was without his annuity payments for a period of six months. App., *infra*, 1a n.1.

Respondent sought review of the OPM decision by the Merit Systems Protection Board (MSPB). He contended that OPM was equitably estopped from discontinuing his annuity payments because he had received misinformation from Federal Personnel Manual Letter No. 831-64, the circular given him by the Navy. An MSPB administrative judge rejected the estoppel claim, holding that "OPM cannot be estopped from enforcing a statutorily imposed requirement for retirement eligibility." App., *infra*, 22a. In addition, the administrative judge found that respondent had demonstrated by virtue of his income that he had been restored to earning capacity in 1986 and "that he was not entitled to a continuation of the retirement annuity for that year." *Ibid.*

After the MSPB denied his petition for review (App., *infra*, 32a-33a), respondent sought further review in the Federal Circuit pursuant to 28 U.S.C. 1295(a)(9).

4. A divided panel of the Federal Circuit reversed. It acknowledged as "a long-established rule" the traditional reluctance of courts to apply estoppel against the government. But in its view this Court's decision in *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984), indicated that the government may be estopped upon a finding that

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[1] In order to continue to receive his disability annuity, respondent was required to earn less than $19,016.74 (80 percent of the base salary ($23,771) for a WG-10, Step 4 welder as of December 31, 1986). App., *infra*, 21a.

the traditional elements of estoppel are present and that the government has engaged in "affirmative misconduct." App., *infra*, 3a-10a. Applying this approach, the court first found the traditional elements of estoppel: it concluded that the government knew the facts; that the government gave misinformation to the respondent with the intent that he rely on it; and that the respondent, in good faith, did reasonably rely on it to his detriment. App., *infra*, 9a, 12a. Second, the court ruled that the government, by providing the respondent "with an OPM letter which summarized a law which had been changed some 4 years earlier" had engaged in "sufficient '[affirmative] misconduct' for estoppel to apply." App., *infra*, 10a. The court then rejected the argument that estoppel could not be used to award benefits to one ineligible for them, holding that where an individual would have been eligible "but for" the conduct of the government, it is "no bar" to an estoppel "[t]hat a statutory requirement is thereby effectively nullified." App., *infra*, 13a. The court concluded that estoppel was warranted in this case.

Judge Mayer dissented. In his view, the case was controlled by this Court's decisions in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), and *Heckler* v. *Community Health Services, supra*, because the government agents' negligence here was no worse than in those cases. App., *infra*, 15a-19a. In addition, the dissent found estoppel inappropriate because the respondent had suffered no "irreparable injury" but rather had demonstrated that his earning capacity was, in fact, "restored." App., *infra*, 17a, 19a. Judge Mayer concluded that, while this Court may have left open the question whether the government might be estopped upon a showing of "at least some form of egregious misconduct," "[o]urs is not that kind of case." App., *infra*, 18a.

REASONS FOR GRANTING THE PETITION

On the ground that government agents negligently gave respondent written misinformation about the applicable law, the court below estopped the government from enforcing the requirements of 5 U.S.C. 8337(d). That conclusion cannot be reconciled with this Court's prior rulings refusing, for reasons both of constitutional dimension and sound policy, to estop the government from executing the laws as written by Congress because of the errors of government agents. There are millions of such employees; their mistakes should not determine how the law is applied, or which claims will drain the public treasury.

Moreover, if a court can ever estop the government, a threshold requirement is a proper finding of the traditional elements of estoppel. *Heckler* v. *Community Health Services*, 467 U.S. at 61. Two such elements—reasonable reliance and sufficient detriment—are lacking here. And, even assuming that these threshold elements of estoppel are present, no estoppel against the government is warranted in this case. This Court has left open the question whether the government may be estopped if the traditional elements are coupled with the "affirmative misconduct" of its employees. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. at 788-790. The conclusion of the court below that affirmative misconduct may serve as a basis for estoppel, and its clearly erroneous determination that the ordinary negligence of the employees here was sufficient to satisfy such a standard, sharpens existing conflicts within the courts of appeals over whether, and under what circumstances, the government may be estopped. Given the importance of this question to the efficient and lawful operation of the government, this Court's review of the holding below is warranted.

1. The court of appeals' decision cannot be reconciled with the decisions of this Court. Since its earliest cases, this Court has repeatedly ruled that the government may not be estopped from enforcing the laws.[2] Indeed, to our knowledge, the Court has never held the government estopped, whether the party seeking an estoppel has relied on a misrepresentation of fact (*Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813)), or of law (*Heckler* v. *Community Health Services, supra,*); an oral misrepresentation (*Utah* v. *United States*, 284 U.S. 534 (1932), or a written one (*Lee, supra*); an off-hand remark by a federal employee (*Montana* v. *Kennedy*, 366 U.S. 308 (1961)), or a course of conduct by a federal agency or department (*INS* v. *Hibi*, 414 U.S. 5 (1973)).

a. The Court's rule is based on the principle that, despite hardship in individual cases, the government cannot be "bound [or] estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917). That precept is grounded in the constitutional doctrines of separation of powers and sovereign immunity, as well as in pragmatic considerations of the public interest.

[2] See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1868); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 578-580 (1921); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber Nat'l Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Miranda*, 459 U.S. 14 (1982); *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51 (1984). See also *id.* at 68 (Rehnquist, J., concurring) (distinguishing, as non-estoppel cases, *Moser* v. *United States*, 341 U.S. 41 (1951), and *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973)).

The effect of estopping the government by treating as true the misrepresentations of its agents is to give the words of Executive Branch officials the force of law, while suspending implementation of the conditions established by Congress. Estoppel of the government thus can confer on government employees the status of legislators, and effectively override the mandates of Congress. See *Merrill*, 332 U.S. at 383. That result is beyond the proper authority of the courts. See *INS* v. *Pangilinan*, 108 S. Ct. 2210, 2216 (1988) ("[I]t is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law").

The rule that the government cannot be estopped is like those providing that the sovereign is exempt, absent contrary provision by Congress, from the consequences of its laches or the operation of statutes of limitations. *Utah Power & Light*, 243 U.S. at 409. "[I]ndependently of the royal prerogative once thought sufficient to justify it," the source of the rule's continuing vitality "is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938); see also *Costello* v. *United States*, 365 U.S. 265, 281 (1961); *United States* v. *Hoar*, 26 F.Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373) (Story, Circuit Justice). Where Congress has imposed certain conditions on eligibility and has not provided for their waiver, "[a] Court of equity cannot, by avowing that there is a right but no remedy known to the

law, create a remedy in violation of law." *Pangilinan*, 108 S. Ct. at 2216.

The rule prohibiting estoppel is critical to the government's effective operation. It is unfortunately impossible for the government to prevent every instance in which one of its millions of employees may give out erroneous information.[3] To bind the government in each case to the representations of its employees would uncontrollably drain public revenues and resources. See *Hansen*, 450 U.S. at 789-780; *Hansen* v. *Harris*, 619 F.2d 942, 949 (2d Cir. 1980) (Friendly, J., dissenting), rev'd *sub nom. Schweiker* v. *Hansen*, 450 U.S. 785 (1981). Moreover, it would prompt needless litigation, much of it founded on allegations of misrepresentation by a government employee that could not be documented or otherwise verified.[4]

Finally, for both constitutional and pragmatic reasons, the rule that the government cannot be estopped from enforcing a lawful statute or regulation applies with special force when a party seeks to require the expenditure of public funds in circumstances that do not meet the express conditions established by Congress. See U.S. Const. Art. 1, § 9, Cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); *Community Health Services*, 467 U.S. at 51.

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[3] Over a century ago, when the government was a fraction of its present size, Justice Story observed that the government's "fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses," if equitable doctrines applicable to private parties were to govern. *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824).

[4] We note in this connection that Congress has precluded claims against the government for misrepresentation by its employees under the Federal Tort Claims Act. 28 U.S.C. 2680(h).

b. The facts of this case do not differ in any material respect from those in this Court's earlier cases refusing to estop the government. Indeed, this case is a textbook example of why the government should not be barred from enforcing the laws. Respondent properly drew a disability annuity, but that annuity was subject to the constraints of 5 U.S.C. 8337(d). When respondent earned more than the statutory limit set by that Section, he lost his annuity, as the law provides. Although the annuity was later reinstated, respondent sued, claiming that the Navy's misinformation about the terms of 5 U.S.C. 8337(d) entitled him to the six months of annuity withheld.

This is precisely the situation in which this Court has repeatedly applied its strictures against estopping the government, denying the claims of those who, asserting that a government employee made a negligent misrepresentation to them, seek to receive government benefits without meeting the legal conditions that would make them eligible for those benefits. See, *e.g.*, *Community Health Services*, 467 U.S. at 64 (Medicare reimbursement); *Hansen*, 450 U.S. at 785 (Social Security benefits); *Miranda*, 459 U.S. at 15 (permanent resident status); *Hibi*, 414 U.S. at 8 (naturalization); *Merrill*, 332 U.S. at 384-385 (federal crop insurance). The Court has emphasized that this result is especially indicated when an estoppel would force the expenditure of public funds contrary to the express mandate of Congress. See *Community Health Services*, 467 U.S. at 51; *Hansen*, 450 U.S. at 788; *Merrill*, 332 U.S. at 385.

2. Although this Court has declined to rule that "there are *no cases*" in which the government might be estopped, it has directed that "the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Community Health Services*, 467 U.S. at 60-61. Those elements include both

reliance that is reasonable ("in that the party claiming the estoppel did not know nor should * * * have known" of the misrepresentation) and reliance that is detrimental (in that it caused the relying party "to change his position for the worse"). *Id.* at 59, 61. Neither element is present in this case. Moreover, the Federal Circuit's failure properly to require reasonable reliance conflicts with the holdings of other courts of appeals.

a. Reliance on the words of a government employee that contradict those of a published statute or regulation can never be reasonable: "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Community Health Services,* 467 U.S. at 63. In particular, this Court has consistently held that those seeking public benefits must act with "scrupulous regard" for the requirements of law. Respondent and others are on notice of the administrative regulations controlling the funds they seek. See *Merrill,* 332 U.S. at 384-385; *Community Health Services,* 467 U.S. at 63. *A fortiori,* such persons "[are] charged with knowledge of the United States Statutes at Large." *Merrill,* 332 U.S. at 384.[5]

Nor does the fact that the government official gave respondent an out-of-date government circular affect his duty "to know the law." Although this Court in *Community Health Services* did point to the oral nature of the advice given there as a factor in its analysis of the reliance element, see 467 U.S. at 65, it did not suggest that reliance

[5] Indeed, even between private parties, estoppel cannot be applied "[i]f, at the time when he acted, [the party seeking estoppel] * * * had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant." 3 J. Pomeroy, *Equity Jurisprudence* § 805, at 192 (S. Symons ed. 1941), quoted in *Community Health Services*, 467 U.S. at 59.

is reasonable whenever advice is in writing. Indeed, this Court and the lower federal courts have regularly declined to estop the government despite the fact that some misrepresentation was committed to paper.[6] By abandoning this precedent, the court below has conferred estoppel claims on any number of individuals who may have picked up or negligently been given out-of-date circulars.[7]

In addition, the Federal Circuit's broad finding of reasonable reliance conflicts with the decisions of the Seventh

[6] See, *e.g.*, *Automobile Club* v. *Commissioner*, 353 U.S. at 183-184 (IRS not estopped from retroactively enforcing corrected administrative rulings despite earlier rulings to contrary); *United States* v. *Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Crown* v. *United States Railroad Retirement Board*, 811 F.2d 1017 (7th Cir. 1988); *Scime* v. *Bowen*, 822 F.2d 7 (2d Cir. 1987); *Dorl* v. *Commissioner*, 507 F.2d 406 (2d Cir. 1974); see also *United States* v. *San Francisco*, 310 U.S. 16, 31-32 (1940) (government not estopped from enforcing statute in manner contrary to earlier administrative rulings by Interior Department); *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813) (government not estopped where city commissioners recorded in journal a promise of conveyance of land, which they were without authority to implement).

[7] The court also held that respondent relied "not on incorrect advice from 'government agents' " but "on incorrect advice from the government itself." App., *infra*, 13a. To the extent respondent argues that "the government itself" published the OPM letter, the rule against estoppel in government cases plainly is not limited to situations in which an individual employee acts in a manner that adversely affects a party's application for benefits. For instance, the delay in processing a petition for adjustment of immigration status at issue in *INS* v. *Miranda* was not attributable to any employee's conduct, but was considered on the premise that it was the act of the Immigration and Naturalization Service as a whole. 459 U.S. at 18 & n.3. Similarly, the suspension within the Philippines of the special overseas naturalization program in *INS* v. *Hibi* was ordered by the Attorney General, in consultation with the Commissioner of Immigration, and reflected the official policy of the United States. See 414 U.S. at 10-11 (Douglas, J., dissenting).

and Tenth Circuits. The Seventh Circuit has held that, except in narrow circumstances not relevant here (see generally, pp. 22 & n.22, *infra*), a party claiming a misrepresentation by a government official is "charged with knowledge of the law" and thus cannot demonstrate the reliance traditionally required to support estoppel. See *In re Larson*, 862 F.2d 112, 114-115 (1988); *Crown* v. *United States Railroad Retirement Board*, 811 F.2d 1017, 1020-1021 (1987). Similarly, the Tenth Circuit has held that a party relying on an erroneous interpretation of a regulation by an administrative agency "assumes the risk" that the interpretation is erroneous. See *Emery Mining Corp.* v. *Secretary of Labor*, 744 F.2d 1411 (1984); *United States* v. *Browning*, 630 F.2d 694, 702-703 (1980), cert. denied, 451 U.S. 988 (1981).[8]

b. Respondent's claim of detriment also dissolves upon examination. "To analyze the nature of a private party's detrimental change in position, we must identify the manner in which reliance on the Government's misconduct has caused the private citizen to change his position for the worse." *Community Health Services*, 467 U.S. at 61.

At the heart of this lawsuit is respondent's complaint that he missed the opportunity to manipulate the law for his personal gain—that he should have been given correct advice so that he could have received both a government disability annuity and the highest attainable level of wages from his employment as a bus driver. This desire to work the system as close to the edge as possible, while not illegal, is surely not the type of detriment that traditionally

[8] Without making explicit findings that reasonable reliance was lacking, a number of circuits have declined to allow estoppel on the basis of an unauthorized misrepresentation of law. See, *e.g.*, *Goldberg* v. *Weinberger*, 546 F.2d 477, 481 (2d Cir. 1976). We discuss these holdings in more detail below (see pp. 19-22, *infra*).

supports an estoppel. As Judge Mayer correctly observed, "Congress certainly did not intend that beneficiaries gerrymand their earnings to get extra money from the taxpayers." App., *infra*, 19a.

The statute in this case reflects Congress's judgment that earned wages of at least 80 percent of the current rate of pay of a retiree's former position indicate a restored capacity to earn and hence, a loss of disability. Respondent did in fact demonstrate that he had the "capacity" to earn more than 80 percent of his former job's salary. Given the purpose of Section 8337(d) to measure "earning capacity," respondent thus was not substantively entitled to his disability annuity. He cannot claim that the detriment he faces because the government ascertained his actual capacity "is so severe or has been imposed in such an unfair way that [the government] ought to be estopped from enforcing the law in this case." *Community Health Services*, 467 U.S. at 66.

3. Despite the general rule that estoppel should not be applied to obstruct enforcement of the law, and the fact that not even the elements traditionally required to estop a private party were present here, the court of appeals estopped the government on the ground that its agent had engaged in "affirmative misconduct."[9] Its action illustrates

[9] As noted above (see pp. 11-12, *supra*), the Court in *Community Health Services* made clear that a claim of "affirmative misconduct" cannot succeed in any case if the traditional elements of estoppel are not met. In *Community Health Services*, a fiscal intermediary charged with administering the receipt, disbursement, and accounting of funds granted a nonprofit health care provider under the Medicare program repeatedly gave misinformation to that organization. This negligence pushed the health care provider into severe financial turmoil when it led to a $71,480 overpayment determination. 467 U.S. at 62. This Court's holding clarified that even an agent's sustained negligence does not warrant an evasion of the traditional requirements of estoppel, including reasonable reliance and detriment.

the need for guidance: the absence of a clear standard for the application of estoppel to the government has led to anomalous results like that in the present case and has prompted the development of conflicting standards among the courts of appeals.

a. The court of appeals' application of an affirmative misconduct "exception" to the rule against estopping the government is based on language in this Court's opinions but is incompatible with the principles enunciated there.

The Court has left open the question whether "affirmative misconduct" by government agents may in some cases justify estoppel of the government. *Community Health Services,* 467 U.S. at 60-61; *Miranda,* 459 U.S. at 17-18; *Hansen,* 450 U.S. at 788; *Hibi,* 414 U.S. at 8-9; *Montana,* 366 U.S. at 314-315. But as explained above (see pp. 8-10, *supra*), the reason this Court has declined to estop the government is to protect the public interest from the consequences of error or misconduct by government employees. In particular, the doctrine ensures that the actions of those in the Executive Branch do not interfere with the proper execution of the laws written by Congress. Estoppel of the government undermines these purposes, whether a government representative's actions are merely negligent or rise to some unspecified higher level of misconduct. It would be inconsistent with the theoretical underpinnings of the general rule for courts to hold that agencies are bound by the actions of their representatives in those situations—and only those situations—in which there can be no doubt that the responsible agency officials did not approve, and never would have approved, of the representatives' actions.

b. Were this Court to decide that the estoppel doctrine warranted an affirmative misconduct exception, the exception would not in any event apply here. The misrepresentations made by the Navy employees in this case cannot

be distinguished from the behavior of other government agents that the Court has found to fall " 'far short' " of affirmative misconduct. *Hansen,* 450 U.S. at 790 (quoting *Montana,* 366 U.S. at 314).

In *Schweiker* v. *Hansen,* a Social Security Administration claims representative incorrectly informed a claimant that she could not qualify for benefits and failed, contrary to the agency's claims manual, to recommend that she file a written application. 450 U.S. at 786. Because a written application was required under agency regulations (*id.* at 790), the claimant lost her entitlement to approximately 12 months of benefits for which she was otherwise eligible. In *Montana* v. *Kennedy,* an American consular official erroneously advised the petitioner's mother that she could not travel to the United States because she was pregnant. Consequently, the petitioner was born abroad and could not claim American citizenship by birth. In these cases, as in a number of others, the Court found that conduct of government agents at least as blameworthy as that here was far less than would warrant estoppel of the government.[10]

The court of appeals sought to distinguish the present case on the ground that the respondent was given written,

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[10] See also *Hibi*, 414 U.S. at 8-9 (no affirmative misconduct where government failed fully to publicize rights under statute and to station authorized naturalization representative in the Philippines); *Miranda*, 459 U.S. at 19 (no affirmative misconduct where INS failed to act on visa petition for 18-month period); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183-184 (1957) (facts insufficient to support estoppel where IRS Commissioner, who had followed erroneous interpretation of tax law, sought to apply corrected ruling retroactively); *Merrill, supra* (same, where government agent erroneously advised farmers that their crop was insurable and aided their application to government); *United States* v. *San Francisco*, 310 U.S. 16, 31-32 (1940) (same, where government sought to enforce provisions of Raker Act in manner contrary to earlier administrative rulings by Interior Department).

not only oral, misinformation. While this Court has noted that written information may induce greater reliance than oral information (*Community Health Services,* 467 U.S. at 65; see pp. 12-13, *supra*), it has never suggested that a government agent commits "affirmative misconduct" whenever he or she negligently passes on misinformation in writing. To the contrary, the Court has made clear that any concept of "affirmative misconduct" requires more egregious behavior.[11] Indeed, the employees' actions here fit into the same category of behavior that this Court determined to fall " 'far short' " of affirmative misconduct in *Hansen*: like the claims representative there, the employees in this case negligently provided outdated information; they did not deliberately mislead the respondent, make false promises, or otherwise defraud him. See 450 U.S. at 790 (quoting *Montana,* 366 U.S. at 314); cf. *Scime* v. *Bowen,* 822 U.S. 7, 9 (2d Cir. 1988) (case in which erroneous advice about eligibility for benefits was conveyed in writing is indistinguishable from *Hansen*).

The presence of written misrepresentation no more rationalizes the application of estoppel to the government than the presence of other forms of misconduct. In each case, the errors of Executive officials are compounded, not resolved, by a judicial requirement that the mandates of Congress be violated. Further, to the extent that the court of appeals' decision turns on the receipt of an out-of-date government publication, it opens the door to potential government liability on every claim that a duly enacted law does not apply to one who has solicited and received,

[11] See, *e.g., Miranda, supra* (no estoppel on the basis of an 18-month delay by the INS which cost an immigrant his residency rights); *Hibi,* 414 U.S. at 8-9 (no estoppel despite failure by Executive officials to give full publicity to naturalization rights or to make personnel available to those wishing to effectuate those rights).

or simply taken home from a government office, a circular containing out-of-date, and therefore inaccurate, information.[12]

c. The uncertain state of the law in this are has generated a confusion of approaches to estoppel in the courts of appeals. See *Hansen,* 450 U.S. at 792 (Marshall, J., dissenting) (chiding Court for failure to give guidance to lower courts); *Home Savings & Loan* v. *Nimmo,* 742 U.S. 585, 586 (10th Cir. 1984) (requesting Court to clarify estoppel standard). In particular, the lower courts are sharply divided over whether, and in what circumstances, an affirmative misconduct exception applies. See, *e.g., Akbarin* v. *INS,* 669 F.2d 839, 842-843 (1st Cir. 1982) (reviewing confusion over meaning of "affirmative misconduct").

i. In sharp contrast to the Federal Circuit, three circuits (the Tenth, the Eleventh, and the District of Colum-

[12] The weight accorded the circular by the court below also brings its holding into conflict with the decisions of a number of other courts of appeals. In *Crown, supra,* Railroad Retirement Board employees repeatedly misinformed a railroad employee about the amount of annuity he could expect to receive upon retirement, and a district manager confirmed the mistaken estimates in a letter; the misrepresentations induced the employee to retire. The Seventh Circuit did not consider that the existence of writing (which reflected far greater deliberation than the "writing" did here) affected the rule that estoppel should not be applied to force the government to pay benefits to one not statutorily entitled to them. 811 F.2d at 1021-1022. The Second Circuit also has declined to give written communications such dispositive weight. See *Scime* v. *Bowen,* 822 F.2d 7, 9 (1987) (finding no affirmative misconduct despite erroneous written advice regarding eligibility for benefits); *Dorl* v. *Commissioner,* 507 F.2d 406, 407 (1974) (no estoppel despite misrepresentation contained in letter from I.R.S. agent). Accord *United States* v. *Killough,* 848 F.2d 1523, 1526-1527 (11th Cir. 1988).

bia) have declined to recognize an "affirmative misconduct" exception to the general rule and have instead constructed a circuit-specific approach. Thus the Eleventh Circuit, eschewing the "hypothetical" question whether such an exception applies,[13] has declared estoppel to be appropriate only where the traditional elements are present, the government is acting in its "proprietary" capacity, and the government agent was acting within the scope of his or her authority.[14] The District of Columbia Circuit has held that when the traditional elements of estoppel are combined with "a showing of injustice," estoppel will lie against the government providing there is no "undue damage to the public interest."[15] And the Tenth Circuit

[13] *Deltona Corp.* v. *Alexander*, 682 F.2d 888, 892 (1982); see also *Lyden* v. *Howerton*, 783 F.2d 1554, 1558-1559 (1986).

[14] See *United States* v. *Killough*, 848 F.2d 1523, 1526 (1988); *United States* v. *Vonderau*, 837 F.2d 1540, 1541 (1988); *Federal Deposit Ins. Corp.* v. *Harrison*, 735 F.2d 408, 410-411 (1984); see also *George* v. *Railroad Retirement Board*, 738 F.2d 1233, 1236 (1984) (declining to determine whether "affirmative misconduct" can estop government acting in "sovereign" capacity on ground that misrepresentation of government agent concerning eligibility for benefits did not amount to such misconduct).

The Eleventh Circuit's attention to the "proprietary" nature of government activity is contrary to this Court's determination in *Merrill*, 332 U.S. at 383, that the government does not become "another private litigant • • • whenever it takes over a business • • • or engages in competition with private ventures." The Circuit's approach has been rejected by a number of other courts. See, *e.g.*, *Wagner* v. *Director, Federal Emergency Management Agency*, 847 F.2d 515 (9th Cir. 1988); *Phelps* v. *Federal Emergency Management Agency*, 785 F.2d 13, 17 (1st Cir. 1986).

[15] See *ATC Petroleum, Inc.* v. *Sanders*, 860 F.2d 1104, 1111 (1988); see also *GAO* v. *GAO Personnel Appeals Board*, 698 F.2d 516, 526 (1983) (requiring misrepresentation by government agent that would cause "egregiously unfair result").

has held that the application of estoppel against the government is justified only when "it does not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation."[16] Contrary to the practice of the Federal Circuit, the government cannot be estopped in the Tenth Circuit solely on the ground that an agent without authority to bind the government has misled an individual.[17]

ii. A number of circuits have applied an affirmative misconduct standard, but have done so in varying ways. Thus the Ninth Circuit requires affirmative misconduct "going beyond mere negligence," but permits estoppel only if the government's act has caused a serious injustice and the public's interest will not suffer "undue damage."[18] And the Eighth Circuit, without defining the term, has rejected estoppel in circumstances analogous to those here.[19]

[16] See *Emery Mining Corp.* v. *Secretary of Labor*, 744 F.2d 1411, 1416 (1984); see also *United States* v. *Wingfield*, 822 F.2d 1466, 1476 (1987) (estoppel requires establishing traditional elements and attention to "additional consideration" that it may undermine "interest of citizenry • • • in obedience to the rule of law"), cert. dismissed *sub nom. County of Boulder* v. *United States*, 108 S. Ct. 1762 (1988).

[17] See *United States* v. *Browning*, 630 F.2d 694, 702 (1980), cert. denied, 451 U.S. 988 (1981); *Emery*, 744 F.2d at 1416.

[18] See *Morgan* v. *Heckler*, 779 F.2d 544, 545 (9th Cir. 1985); *Watkins* v. *United States Army*, No. 85-4006 (May 13, 1989) (en banc), slip op. 15. Perhaps because the Ninth Circuit has "no single test for detecting the presence of affirmative misconduct" but decides each case "on its own particular facts and circumstances" (*Watkins*, slip op. 15-16), its application of the standard has not been uniform. Compare *Mukherjee* v. *INS*, 793 F.2d 1006, 1008-1009 (1986) (no estoppel where vice-consul negligently misrepresented exemption from residency requirement) with *Watkins, supra* (in view of prior practice of allowing reenlistment of homosexual soldier, army is estopped from enforcing regulations prohibiting his reenlistment).

[19] See *Leimbach* v. *Califano*, 596 F.2d 300, 305 (1979) (government not estopped from denying benefits where agents repeatedly gave

The First Circuit similarly has rejected the claim that statutory requirements should not be enforced because of the misrepresentations of a government agent,[20] but has occasionally recognized an exception, including the possibility of estoppel on the basis of a misrepresentation where deportation is at stake.[21] Finally, the Second and Seventh Circuits have developed estoppel approaches that include narrow and conflicting exceptions, although both generally require the presence of affirmative misconduct.[22]

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misinformation about eligibility); see also *United States* v. *Manning*, 787 F.2d 431, 436-437 (1986) (no estoppel on ground of misleading statements).

The Eighth Circuit has abstracted the meaning of "affirmative misconduct" from this Court's decisions "by negative implication." *Chien-Shih Wang* v. *Attorney General*, 823 F.2d 1273, 1276 (1987). A similar approach—defining affirmative misconduct by determining what this Court has declined to label as such, and then noting that the case before it falls "far short" of such behavior—marks the decisions of several circuits. See, *e.g.*, *Zimmermann* v. *Heckler*, 774 F.2d 615, 617 (4th Cir. 1985).

[20] See *Phelps* v. *Federal Emergency Management Agency*, 785 F.2d 13, 17 (1986) (disallowing estoppel defense raised by claimant who failed to comply with procedural prerequisites for obtaining government flood insurance payments).

[21] See *Akbarin* v. *INS*, 669 F.2d 839 (1982); see also *Best* v. *Stetson*, 691 F.2d 42 (1982) (applying estoppel standard "closer to that involved in ordinary cases" to government where regulations with which party did not comply were later found unconstitutional).

[22] See, *e.g.*, *Scime*, 822 F.2d at 9; *Corniel-Rodriguez* v. *INS*, 532 F.2d 301, 306-307 (2d Cir. 1976); *Edgewater Hospital, Inc.* v. *Bowen*, 857 F.2d 1123, 1137-1139 (7th Cir. 1988); *Portmann* v. *United States*, 674 F.2d 1155, 1167 (7th Cir. 1982). In the Second Circuit, the government cannot be estopped from enforcing legal requirements determining entitlement to benefits (see *Scime*, 822 F.2d at 9; *Goldberg*, 546 F.2d at 480-481), except in certain circumstances where it has failed to perform a legally required task in the immigration context (see *Corniel-Rodriguez*, 532 F.2d at 306-307; *Scime*, 822 F.2d at 9 (limiting *Corniel-Rodriguez*)). The Seventh Circuit, by contrast, has held more generally that reliance on the misrepresentation of a government agent cannot form the basis of an estoppel that forces payment of statutory benefits to which a party is not entitled. See *In re Larson*, 862 F.2d 112, 114 (1988); *Crown*, 811 F.2d at 1021. But that circuit has estopped the government in certain limited circumstances involving "proprietary" or similar activities (see, *e.g.*, *Portmann*, *supra*; *United States* v. *Fox Lake State Bank*, 366 F.2d 962 (1966)), upon occasion doing so without requiring the presence of affirmative misconduct (see *Azar* v. *United States Postal Service*, 777 F.2d 1265 (1985)). See generally *Crown*, 811 F.2d at 1021 (limiting cases).

4. The holding in this case is of great importance to OPM and other government agencies. The Federal Circuit's exclusive jurisdiction includes, *inter alia*, important cases under the Contract Disputes Act of 1978 (28 U.S.C. 1295(a)(10)), most matters involving the Merit Systems Protection Board (28 U.S.C. 1295(a)(9)), and claims for money damages brought against the government under the Tucker Act (28 U.S.C. 1295(a)(2) and (3)). The facts in this case are unexceptional; if the Federal Circuit can estop the government on the basis of the type of negligence that occurred here—unfortunate and improper but hardly egregious—it will regularly obstruct proper execution of the laws. In addition, the holding below further accentuates existing conflicts among the courts of appeals: the success of an estoppel claim now varies widely depending on the federal court in which it is heard.

Review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JUNE 1989

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 88-3243

CHARLES RICHMOND, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

DECIDED: December 2, 1988

Before: MAYER, *Circuit Judge,* NICHOLS, *Senior Circuit Judge,* and MICHEL, *Circuit Judge.*

MICHEL, *Circuit Judge*

The decision of the Merit Systems Protection Board (board), Docket No. SF831L8710762, affirming the Office of Personnel Management's (OPM's or the agency's) ruling that Charles Richmond is ineligible for disability annuity payments after June 30, 1987 because, in view of his income in 1986, Mr. Richmond has been restored to earning capacity, is reversed and the case is remanded.[1]

Background

The facts and the applicable statutory law are undisputed. If a person receiving a disability retirement annuity is restored to an earning capacity fairly comparable

[1] Respondent's brief states without full explanation that, notwithstanding the agency's original decision that Mr. Richmond had been restored to earning capacity, the agency reinstated Richmond's disability payments as of January 1, 1988. Res. Br. at 4. Accordingly, the brief further states, the agency's original decision only denied Mr. Richmond benefits for the months July through December, 1987. Our decision then applies at least to the aforementioned 6 month period.

to his former position, payment of the annuity shall be terminated 180 days after the end of the calendar year in which restoration occurred. 5 U.S.C. § 8337(d) (Supp. 1988). Earning capacity is deemed restored if, in any single calendar year, the annuitant's earned income equals at least 80% of the current rate of pay for his former position. The agency discontinued disability annuity payments to Mr. Richmond, a retired[2] welder, WG-10, Step 4, formerly employed by the United States Department of the Navy, as of June 30, 1987. The payments were discontinued because Richmond's income during calendar year 1986 exceeded 80% of his former job's current base salary.[3]

Although application of the relevant statute to Richmond's case appears straightforward, Richmond argues, and indeed the board found in the face of no dispute by the agency, that Navy employee relations specialists misinformed Richmond that the measuring period for determining restoration was 2 years rather than a single calendar year. As late as January, 1986, Richmond received from the Navy written OPM notice that when, in each of 2 consecutive years, earned income equals at least 80% of the current rate of pay for the position retired from, earning capacity is deemed restored and the disability annuity is stopped.[4] Apparently the misrepresentation to Richmond resulted because prior to the enactment of Public Law

[2] According to the agency's brief, Richmond retired from federal service on June 6, 1981.

[3] As stated in the board's decision, the base salary for a WG-10, Step 4, as of December 31, 1986, was $23,771. Eighty percent of $23,771 is $19,016.74. Richmond reported an income of $19,936 for 1986.

[4] In response to Richmond's inquiries, petitioner was given a copy of Federal Personnel Manual Letter 831-64, Attachment 4, issued by OPM and containing the misinformation.

97-253, § 302(a)(1), effective December 31, 1982, the applicable statute, 5 U.S.C. § 8337(d), called for restoration to earning capacity to be determined based on earnings for "each of 2 succeeding calendar years." In reliance on the misinformation in this OPM letter, Richmond, who subsequent to his retirement was working as a bus driver, accepted additional hours of work in 1986. He believed that the additional hours of work, which he says are not normally available to him, would temporarily increase his income, but would not cause loss of his disability benefits.

In reviewing the agency's action, the board stated that "[a]lthough it is undisputed that appellant's former employer, the Department of the Navy, gave appellant misinformation upon which he relied, that agency was not the Office of Personnel Management (OPM)." Accordingly, the board held that OPM cannot be estopped from enforcing a statutorily imposed requirement for terminating disability retirement eligibility, and observed that Richmond should have sought and entertained information respecting continued eligibility only from OPM. Richmond appeals.

ISSUE

Whether on the facts and circumstances of this case the OPM is estopped from terminating Richmond's disability benefits because relying on an OPM letter he allowed his earned income in 1986 to exceed 80% of his former job's current base salary.

OPINION

We do not agree with the board's view that the agency cannot be estopped from discontinuing Richmond's disability benefits. In our view, the agency can be estopped because of the affirmative misconduct of the government

in informing Richmond in writing in 1986 that his right to disability benefits would be maintained if Richmond's income did not exceed the 80% ceiling for 2 consecutive years. Richmond would have foregone the additional, temporary 1986 wages and maintained his eligibility for disability benefits had he not relied upon the out-of-date OPM letter given him by Navy employees whom he had no reason to believe were not providing him with accurate information.

We are aware of the long-established rule that ordinarily the government may not be estopped because of erroneous or unauthorized statements of government employees when the asserted estoppel would nullify a requirement prescribed by Congress, *see, e.g., Schweiker* v. *Hansen,* 450 U.S. 785, 788 (1981) (per curiam)[5] and that generally "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler* v. *Community Health Services of Crawford,* 467 U.S. 51, 63 (1984). However, the Supreme Court has clearly left open the possibility that estoppel may be invoked against government agencies in some particular circumstances. In *Community Health Services,* the Supreme Court specifically declined an invitation to announce a flat rule that "estoppel may not in any circumstances run against the Government." *Id.* at 60. Instead the Court said:

> Though the arguments the Government advances for the rule [that estoppel may never run against the Government] are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are

[5] Government was not estopped from denying "mother's insurance benefits" to respondent who had failed to file for them because of erroneous *oral* advice of Social Security Administration field representative that she was ineligible.

> *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.

Id. at 60-61 (emphasis in original) (footnote omitted).

Since the Supreme Court's decision in *Community Health Services,* courts of appeals have determined whether, on the facts of a given case, estoppel should be applied against the government. Certain cases have determined that estoppel should apply. In *Fano* v. *O'Neill,* 806 F.2d 1262 (5th Cir. 1987), Fano had asserted before the district court that the government was estopped from denying him permanent resident status since when he filed he met all requirements and was denied permanent residency only because the government had "recklessly and negligently" delayed processing his application and in the meantime, he became ineligible as over 21 years of age. *Id.* at 1265. The processing delay was in direct contradiction to the Service's Operations Instruction on which Fano had relied in filing his application just prior to his 21st birthday, and according to which such applications were to receive urgent processing. *Id.* at 1263. The district court granted summary judgment rejecting Fano's estoppel argument.

The court of appeals stated that, according to Supreme Court cases, in order for estoppel to apply, Fano had to show some sort of "affirmative misconduct" on the part of the government. *Id.* at 1265. The court further observed that "to state a cause of action for estoppel against the government, a private party must allege more than mere negligence, delay, inaction or failure to follow an internal agency guideline." *Id.* In the court's view, Fano's allega-

tions of reckless and negligent, and possibly even willful and wanton delay, could establish affirmative misconduct. Accordingly, the district court was required to allow Fano to develop his case through discovery since, if proven, his charges could support estoppel. *Id.* at 1266. The causes for the delay presented genuine issues of material fact possibly showing affirmative misconduct and giving rise to an estoppel.[6]

Our own decisions have also recognized the viability of government estoppel. In *USA Petroleum Corp.* v. *United States,* 821 F.2d 622 (Fed. Cir. 1987), we stated "[t]he equitable defense of estoppel is available to parties contracting with the government and requires a case-by-case determination designed to avoid injustice." *Id.* at 625. In that case we made note of the traditional elements of estoppel as set out by the lower court:

> 1. The party to be estopped must know the facts;
> 2. he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
> 3. the latter must be ignorant of the true facts; and
> 4. he must rely on the former's conduct to his injury.

[6] In our view, the decision in *Fano* is not undermined by the subsequent Supreme Court decision in *Immigration and Naturalization Service* v. *Pangilinan,* 108 S. Ct. 2210 (1988). *Pangilinan* involved the respondents' recent application for citizenship under a special immigration statute that expired in 1946. *Id.* at 2214. There was no indication that the respondents had relied on any misinformation from the government in waiting more than 30 years after the statute expired before petitioning for citizenship. Nonetheless, the Ninth Circuit ordered naturalization of the respondents. *Id.* at 2212. The Supreme Court held that under these circumstances it was improper to ignore the statutory provisions for determining eligibility for citizenship. *Id.* at 2216.

Id. We concluded that these elements of estoppel had been established by the contractor. Specifically, we observed that the government failed to conform quantities of oil it reported for payment purposes to the actual quantities it knew were delivered by the contractor. As a result of these discrepancies, the government overpaid the contractor for the oil, and the contractor in turn made unrecoverable overpayments to its suppliers. *Id.* at 623.

Additionally, the government waited for 6 months after it knew of the discrepancies to notify the contractor of the overpayments. *Id.* at 625. Based on these facts, we determined that the government was estopped from seeking restitution from the contractor. We pointed out that our result in *USA Petroleum* was not inconsistent with *Community Health Services,* which declined to apply estoppel against the government because there the contractor failed to ascertain legal requirements from "the correct channels" and in writing. *Id.* at 626. Our overall conclusion was that the contractor's right to rely on the government's continued written representations as to oil deliveries justified application of estoppel.

More recently, we discussed the application of equitable principles (although not explicitly "estoppel") to government action in *National Corn Growers Association* v. *Baker,* 840 F.2d 1547 (Fed. Cir. 1988). *Corn Growers* involved a temporary provision in the Tariff Schedule that imposed a sixty-cent per gallon tariff on imported ethanol. *Id.* at 1549. When the Commissioner of Customs interpreted the new statute so as to exclude certain imported mixtures in part of ethanol, domestic ethanol producers protested. In response, the Commissioner reversed his prior ruling, deciding to apply the sixty-cent per gallon duty to the previously exempted mixtures. *Id.* In order to avoid unfairness, however, the Customs Service decided to

allow importers who had relied upon the exemption to complete importation of their mixtures free of the applicable duty. *Id.* Corn Growers and others objected, questioning the authority of the Commissioner to limit equitably the application of the tariff provision. *Id.* at 1549-50.

We stated that the Commissioner, having fundamentally reinterpreted the law regarding the ethanol imports, was free not to give the new interpretation retroactive application. We took the view that to require the Commissioner to apply the subject provision as newly interpreted to all importations would be unfair. *Id.* at 1552. Having relied on the government's first stated view of the law, importers "should not be penalized" for following what the government said, based on its subsequent reinterpretation of the law. *Id.* Our decision in *Corn Growers* appears consistent with the cases listed in *Community Health Services* in which the court seemed to acknowledge that estoppel had been properly, although implicitly applied against the government. *See Community Health Services,* 467 U.S. at 60, n.12.

In *Frantz* v. *Office of Personnel Management,* 778 F.2d 783 (Fed. Cir. 1985) our court itself implicitly applied estoppel against the government. We held that OPM may not deny benefits to individuals who have been affirmatively misled by agency officials as to those benefits. In *Frantz* the agency had rejected, as untimely, a late election of a survivor's annuity where an annuitant had earlier received erroneous information from the agency. Based on the misinformation, the annuitant had chosen not to elect to have her husband receive survivor benefits if she predeceased him. *Id.* at 784. An agency personnel counselor had given the annuitant the erroneous information orally and in writing by means of an agency-approved

form. *Id.* We determined that under the circumstances and notwithstanding the subsequent sending of correct information to the annuitant, a reasonable person would at least have been confused as to the proper election. We held that the board's finding to the contrary was not supported by substantial evidence. *Id.* at 787. Accordingly, we ordered the agency to accept the annuitant's application amending her election as to survivor benefits, even though doing so effectively nullified the filing deadline in the act.

Based on the Supreme Court's acknowledgment that the estoppel against the government is not foreclosed and based on court of appeals rulings applying estoppel against the government, our view is that estoppel is properly applied against the government in the present case. Here, the traditional elements of private estoppel all have been met. The government knew that, subsequent to December 31, 1982, restoration to earning capacity must be determined by a beneficiary's earnings in a single calendar year. Furthermore, when the Navy personnel specialists informed Richmond orally and in writing, by way of an OPM letter, that eligibility was determined based on earnings in 2 successive calendar years, the government, acting through the specialists, obviously intended that Richmond accept the truth of the representations. Also, despite his diligence, Richmond remained ignorant of the true state of the law, and relied on the government's representations to his injury. His case is even more compelling than Frantz's because according to *all* the information the government had provided Richmond, he was safe in accepting what additional, temporary wages he could earn in calendar year 1986. Richmond thus did not get conflicting advice that could have confused him; he got consistent advice that misled him.

With regard to establishing "affirmative misconduct," we conclude that the government's action in providing

Richmond with an OPM letter which summarized a law which had been changed some 4 years earlier is sufficient "misconduct" for estoppel to apply. To provide such a letter to an individual who apparently made specific requests for current written information through what appeared to be the correct channels is reckless, at the very least. That it was "affirmative" conduct cannot be disputed.

Nor may the government be heard to assert that Mr. Richmond should not have relied upon the OPM letter given him by Navy personnel specialists, but should have gotten his information solely and directly from OPM. First, Mr. Richmond did get information published by OPM itself, although the OPM letter was obtained from the Navy. Second, unless the government warns annuitants against making inquiries of their former agency of employment, it is simply not fair to prejudice their retirement or disability income because they communicated with their own agency. According to the record before us, no such warning was ever given to Mr. Richmond. In cases such as this where the government is properly subject to estoppel, it cannot avoid the consequences of estoppel simply because the agency which provided the OPM letter was not OPM.

The facts here as to what reasonably appeared to be "correct channels" are quite different than in *Community Health Services*. There the party seeking to assert estoppel obtained oral advice from a private contractor acting as an agent for the government, not from government officials or employees, and from a private individual concerning what plainly was an agency-wide policy issue involving legal requirements. The court rejected reliance under these circumstances as unreasonable. 467 U.S. at 55-56, 61, 65.

Richmond, however, dealt with Navy personnel specialists who gave him a government-wide letter from

OPM, the administering agency for disability annuities. It seems reasonable for him to have assumed that the OPM letter they gave him was both authoritative and current. He did.

On the particular facts of this case, all the elements of estoppel have been shown as has affirmative misconduct. In sum, our view is that Richmond's interest in "some minimum standard" of reliability "outweigh[s]" (*Community Health Services*, 467 U.S. at 61) the government's interest in avoiding estoppel and denying disability benefits to Richmond based on the 1 year rather than the 2 year period for determining continuing eligibility as affected by restoration to earning capacity.

It may be asked whether since in its most specific language in *Community Health Services*, 467 U.S. at 60, the Supreme Court merely left open the possibility of courts applying estoppel against the government, our holding here is permitted. But notwithstanding the absence of affirmative Supreme Court precedent, there can be no doubt that courts may and in fact do apply estoppel against the government. Courts of appeals, including our court, have estopped the government in varying factual contexts in cases such as *Fano* and *USA Petroleum, supra*.

If then estoppel is available against the government in proper cases, given proof of the traditional elements of private estoppel plus affirmative government misconduct, is its availability limited only to cases involving contracts? While our own decision in *USA Petroleum* was concededly a contract case, the Fifth Circuit's decision in *Fano*, dealing with immigration, clearly was not.

Rather than requiring the presence of a contract or some other earmark of a limited class of cases to which estoppel might apply, the logic of the landmark decisions leads to

the conclusion that the most crucial consideration is the objective reasonableness of the reliance. *Community Health Service,* 467 U.S. at 64, 65. Thus, estoppel has been avoided where the individual relied only on oral advice (*Schweiker*, 450 U.S. at 786, 788); and where the advice came from persons who were not cloaked with the mantle of authority to speak for the government as to legal requirements (*Community Health Services,* 467 U.S. at 64). Neither of those limitations applies here.

It also may be asked if estoppel can ever be applied to award benefits to one who at least temporarily becomes statutorily ineligible to receive them. The answer, we believe, should depend on what caused the ineligibility. Here, Mr. Richmond was plainly eligible in 1981-86 and was receiving disability retirement checks. Again in 1988, he was apparently deemed eligible and again began receiving checks. As to 1987, it is undisputed that he properly received checks for the first 6 months, but was declared restored to earning capacity and thus ineligible as of July 1987 because of extra wages in 1986 that put him slightly over the income limit for calendar 1986.

Was his salary increased in 1986 to achieve restoration? No, he merely received additional wages for overtime that was not available in other years. Thus, this is not a case where, for example, an annuitant was offered a raise that would put him permanently over the limit, but asked the employer to decrease the raise in order to stay under the limit so as to maintain eligibility. Nor should we find bad faith or manipulativeness in Mr. Richmond's inquiry to the Navy. For one thing, the 80% figure as the measure of restoration of earning capacity (rather than 100%) guards against manipulation of salary levels. Further, it is undisputed here that the increase in income was but temporary.

Before accepting the overtime offered, Richmond inquired about the applicable period for measuring restoration. The OPM letter given him erroneously indicated the period was 2 years. Through nearly all of 1986, Richmond's income remained below the limit; he exceeded the annual income limit only because of the incorrect statement in the OPM letter, which led him to accept the unusual overtime. Since reliance on the government misstatement directly caused the temporary ineligibility, it seems quite unfair to conclude that because of it, estoppel is automatically unavailable. It would seem, rather, that this "but for" relationship presents precisely the situation where estoppel is most appropriate. That a statutory requirement is thereby effectively nullified in an individual case is no bar, as *Fano* shows.

Nor should its application here be avoided by rigid adherence to the axiom that everyone dealing with the government is presumed to know the law and thus to know not to rely on incorrect statements of government agents. In the context of corporations negotiating contracts with the government, there is no reason to limit resort to this axiom. Government contractors typically know the government contracts business and they often have attorneys. In contrast, however, Mr. Richmond is not in the government annuities business and cannot reasonably be presumed to know the specific statutory provisions as they change from time to time. Nor is it likely that this former Navy welder who now drives a bus has attorneys to ask. Instead, he asked Navy personnel specialists. They provided him with the OPM letter. He relied on it. In so doing, Richmond relied not on incorrect advice from "government agents" (*Community Health Services,* 467 U.S. at 63), but on incorrect advice from the government itself. The OPM letter was obviously intended as guidance

for all disability annuitants, was printed under OPM's letterhead, was addressed to "Heads of Departments and Independent Establishments," and was signed by the Acting Deputy Director. Was Mr. Richmond's reliance on it unreasonable? We think not. Was the government reckless in furnishing the superseded OPM letter? We think so.

Our decision is not a departure from our own or Supreme Court precedent. It simply reflects the specific facts in this case. They are sufficiently unusual and extreme that no concern is warranted about exposing the public treasury to estoppel in broad or numerous categories of cases. Estoppel, after all, being equitable, necessarily is based on preserving fairness on the specific facts of the case before the court.

CONCLUSION

Accordingly, the decision of the board is reversed and the case is remanded to the board with instructions to direct the agency to issue the withheld disability benefits to Mr. Richmond.

COSTS

Costs awarded to the petitioner.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 88-3243

CHARLES RICHMOND, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

MAYER, Circuit Judge, dissenting.

There is no doubt that the Navy misinformed Richmond. Relying on the Navy's erroneous advice, he worked additional hours and increased his earnings above 80 percent of the pay of a government welder, his pre-disability retirement position, thereby relinquishing eligibility for benefits under the Civil Service Retirement Act. But the Navy's misinformation is no reason for the court today to estop the government from recognizing that Richmond was, in fact, restored to earning capacity, and was no longer eligible to receive a disability annuity. This decision contravenes the express mandate of Congress in 5 U.S.C. § 8337(d) (Supp. 1988), and Supreme Court precedent.

I agree with the court that *Heckler* v. *Community Health Services of Crawford,* 467 U.S. 51, 60 (1984), left open the question of when, if ever, the government can be estopped from enforcing a validly promulgated statute. But this does not mean that we write on a clean state. In *Schweiker* v. *Hansen,* 450 U.S. 785 (1981), a case strikingly similar to the one we decide today, Hansen sought a retroactive award of "mother's insurance benefits" under the Social Security Act. But for the

erroneous advice and negligent behavior of a field representative of the Social Security Administration, she would have received benefits for the period in question. The field representative had failed to familiarize himself with an amendment, then in effect for a year and a half, which afforded benefits to Hansen. Moreover, the field representative failed to follow an internal agency claims manual which expressly required him to advise Hansen that she should file a written application. Had she been so advised, the representative's error would have been obviated, and benefits would have been forthcoming.

Nevertheless, the Supreme Court held that the field representative's "errors 'fal[l] far short' of conduct which would raise a serious question whether [the government] is estopped from insisting upon compliance with the valid regulation" requiring a written application as a prerequisite to the disbursement of benefits. *Id.* at 790 (quoting *Montana* v. *Kennedy*, 366 U.S. 308, 314 (1961)). The Court said that " 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury,' " *id.* at 788 (quoting *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947)), is not abnegated by the plea of an eligible applicant who has lost benefits because of the erroneous advice of a government employee. That was a more meritorious case than ours because Hansen would otherwise have been entitled to benefits, and she at least approached the administering government agency for guidance, which Richmond did not. But this was not sufficient.

Community Health Services, too, held that the government could not be estopped, in that case from recouping funds mistakenly disbursed, even though the error was a direct result of the repeated failure of an agent of the government to provide correct information, and to follow

correct administrative procedures. 467 U.S. at 57. The Court identified respondent's inability to demonstrate that it had detrimentally relied on the government's misconduct as fatal to its claim. As in that case, Richmond's "detriment" is nothing more than "the inability to [ob]tain money that [he] should never have received in the first place." *Id.* at 61.

Both *Hansen* and *Community Health Services* observed that respondents had suffered no irreparable injury. In *Hansen*, "at worst, [the field representative's] conduct did not cause respondent to take action, . . . or fail to take action, . . . that respondent could not correct at any time." 450 U.S. at 789. And in *Community Health Services,* "respondent lost no rights but merely was induced to do something which could be corrected at a later time." 467 U.S. at 62. This is precisely Richmond's situation: his disability payments were fully restored when his pay fell below the statutory earnings threshold.

Until today, we followed those Supreme Court cases. In *Riggs* v. *Office of Personnel Management,* 709 F.2d 1486, 1488 (Fed. Cir. 1983), for example, we relied on *Hansen* and held that OPM's erroneous ruling, and Riggs' consequent failure to meet a statutory precondition to entitlement, did not estop the government from enforcing the precondition and denying Riggs benefits.

The cases the court believes support its departure from precedent do not. *National Corn Growers Ass'n* v. *Baker,* 840 F.2d 1547 (Fed. Cir. 1988), was restricted to the resolution of a jurisdictional issue, *id.* at 1550, and stands for nothing more than the unstartling proposition that "[t]he law is the law at the time of its existence, whether wrong or not, and 'practical men' have a right to rely on it at the time they perpetrate their actions." *Id.* at 1555. It says nothing about the quite different proposition ad-

vanced by the court today, that citizens are entitled to rely on what, in fact, is not the law.

In *USA Petroleum Corp. v. United States,* 821 F.2d 622 (Fed. Cir. 1987), the company was *contractually bound* to accept information provided by the government. In breach of its express and implied obligations to USA Petroleum, the government knowingly "foisted upon" the company incorrect data. *Id.* at 627. Recognizing the extraordinary exigency created by a situation in which a company "has no legal choice" but to accept the information provided by the government and to perform accordingly, we held that "[t]he equitable defense of estoppel is available to parties contracting with the government. . . . "*Id.* at 625. In contrast to this case, *USA Petroleum* follows the Supreme Court. *Hansen* acknowledges that a different analysis may be in order if "the Government had entered into written agreements which supported the claim of estoppel." 450 U.S. at 788 n.4.

In *Frantz v. Office of Personnel Management,* 778 F.2d 783 (Fed. Cir. 1985), equitable estoppel was neither argued nor discussed.

I am willing to assume, as did the Supreme Court, that violation of "some minimum standard of decency, honor, and reliability" might estop the government, 467 U.S. at 61, but this envisions at least some form of egregious misconduct. Ours is not that kind of case. I also agree that it is deplorable that government employees paid to guide citizens through the bureaucratic maze sometimes fail to perform their duties responsibly, assuming that here it was the Navy's responsibility to advise on OPM's behalf, which is not beyond question. But it is axiomatic that "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Community Health Services,* 467 U.S. at 63.

It seems to me that this is a particularly inappropriate case for making a chasm out of the crack the Supreme Court left open in *Community Health Services.* In section 8337(d) Congress set out a statutory definition of "earning capacity" of general applicability, eliminating the necessity of repeated particularized investigations. Regardless of why it happened, Richmond both met the statutory test of restored earning capacity and demonstrated that he was, in fact, restored to earning capacity. Section 8337 is a generous and salutary provision. But Congress certainly did not intend that beneficiaries gerrymand their earnings to get extra money from the taxpayers. Obviously the statute is susceptible of that abuse, but the court should not encourage it by the novel device of government estoppel in a case like this.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

Docket Number SF831L8710762

CHARLES R. RICHMOND, APPELLANT

v.

OFFICE OF PERSONNEL MANAGEMENT, AGENCY
CSA 2 452 152

Date: October 14, 1987

Before: FRANCIS A. LEE, Administrative Judge.

INITIAL DECISION

INTRODUCTION

Appellant timely appealed the decision of the agency that found he was not entitled to disability annuity payments after June 30, 1987, because he had been restored to earning capacity. The appeal is within the Board's appellate jurisdiction. 5 U.S.C. § 8347(d).

For the reasons set forth below, the agency's decision is affirmed.

ANALYSIS AND FINDINGS

The agency discontinued appellant's disability annuity because his income during the calendar year 1986 exceeded 80% of his former base salary as a Welder, WG-10, Step 4.

Title 5 U.S.C. § 8337(d) provides that if an annuitant receiving a disability retirement annuity, before becoming 60 years of age, is restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement, payment of the annuity terminates on reemployment by the Government or 180 days after the end of the calendar year in which earning capacity is so restored, whichever is earlier. Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80% of the current rate of pay for the position occupied immediately before retirement.

The undisputed facts show that appellant retired from federal service on June 6, 1981. The base salary for a WG-10, Step 4, as of December 31, 1986, was $23,771. Eighty percent of $23,771 is $19,016.74. Appellant reported an income of $19,936 for 1986. Therefore, the undisputed facts show that appellant's income for 1986 exceeded the 80% limit set forth at 5 U.S.C. § 8337(d). Accordingly, the agency discontinued appellant's disability retirement on June 30, 1987, 180 days after the end of the calendar year 1986.

Nevertheless, appellant contends that his former employer, the Department of the Navy, misinformed him that the measuring period for income was 2 years rather than 1 year. Because of this information, appellant accepted additional hours of work with a school district as a bus driver. Appellant stated that his work as a bus driver is normally 5 hours each day, that this year his hours of work will be cut back to that figure, and that his average income for the previous 5 years was only about $12,494. He estimated his income for 1987 at approximately $15,000. Additionally, appellant testified that he received no notice from the agency, until May 12 of this year, that the correct measuring period is 1 year. In support of his

contention regarding the misinformation, appellant offered a copy of Federal Personnel Manual (FPM) Letter 831-64, Attachment 4, which he received from his former employer in January 1986, and which states that when in each of 2 consecutive years income from wages or self-employment equals at least 80% of the current rate of pay for the position retired from, earning capacity is deemed restored and the disability annuity is stopped.

Public Law 97-253, § 302(a)(1), effective December 31, 1982, amended 5 U.S.C. § 8337(d) by substituting 180 days for the 1 year provision relating to the restoration of an annuitant to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement, and "any calendar year" for "each of 2 succeeding calendar years." Although it is undisputed that appellant's former employer, the Department of the Navy, gave appellant misinformation upon which he relied, that agency was not the Office of Personnel Management (OPM). Moreover, the OPM cannot be estopped from enforcing a statutorily imposed requirement for retirement eligibility. *See Koch v. Office of Personnel Management*, 20 M.S.P.R. 461 (1984). This is true even if appellant did not receive notice from the OPM. Appellant's request for information was, unfortunately, directed to his former employer rather than the OPM, who administers the Civil Service Retirement System. Had appellant directed his request for information to the OPM, presumably, he would have learned of the change in the law. Since 5 U.S.C. § 8337(d) provides that earning *capacity* is the criterion for determining entitlement to a continuing disability retirement, and since appellant's earning capacity was demonstrated by his earning an income exceeding the 80% limitation, I find that he was restored to earning capacity in 1986, and, therefore, that he was not entitled to a continuation of that retirement annuity for that year.

DECISION

The agency's decision is AFFIRMED.

FOR THE BOARD: /s/ Francis A. Lee
FRANCIS A. LEE
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on November 18, 1987, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructons are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If

you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX C

United States Office of Personnel Management
Civil Service Retirement System
Washington, D.C. 20415

[May 12, 1987]

Claim Number: A24521520

CHARLES R. RICHMOND
3916 Cherry Blossom
National City, CA 92050

Restored to Earning Capacity

1. Date disability annuity stops: 06/30/87.

2. Rate of basic pay on Dec. 31, 1986 for position occupied immediately before retirement: $23,771.00.

3. Income reported for 1986: $19,936.00.

4. You will be eligible for deferred annuity which begins on: 10/21/11.

Under the Civil Service Retirement System, a disability annuitant who is under age 60 and earns, in any calendar year, at least 80 percent of the current rate of basic pay for the position occupied immediately before retirement is considered to be restored to earning capacity. Your reported income from wages and self-employment for the year shown in Block 3 was 80 percent or more of the current rate of basic pay for the position you occupied immediately before retirement. Therefore, you are considered to be restored to earning capacity and are no longer entitled to continue receiving a monthly disability annuity benefit, even though your medical condition may not have changed.

Your disability annuity will continue to the date shown in Block 1, which is 6 months from the end of the calendar year in which you are considered to be restored to earning capacity. If you are reemployed by the Federal Government before the date shown in Block 1, your disability annuity will stop on the date of reemployment. Tell us at once if you are reemployed before this date. If you are reemployed and your annuity continues, you will be indebted to the Civil Service Retirement System and we will bill you for the overpayment of annuity, plus interest and penalties that may be assessed.

You may be eligible based on your age and length of service for a deferred non-disability annuity beginning when you become age 62. About 60 days before you reach age 62, request OPM Form 1469A, "Application for Deferred Retirement," by calling (202) 632-7700 or writing to:

Office of Personnel Management
Civil Service Retirement System
Employee Service and Records Center
P.O. Box 45
Boyers, PA 16017

Effect on Other Benefits

If you are covered by Federal group life insurance, your coverage will end when your disability annuity stops. You are not eligible to convert your life insurance to an individual policy. If you are enrolled in Federal group health benefits, your enrollment will end when your disability annuity stops; you will then have 30 days in which to convert your coverage to an individual direct pay health insurance contract through the carrier of your group coverage.

Reinstatement of Your Disability Annuity

If, at some time in the future, you lose your earning capacity, you may qualify for reinstatement of your disability annuity. You will be eligible for reinstatement of your disability annuity (in the same amount you now receive) on the first of the year following any calendar year in which your income from wages and self-employment is less than 80% of the current rate of basic pay for the position from which you retired, unless you are: (a) reemployed for more than 1 year after having been found restored to earning capacity in a position under the Civil Service Retirement System (CSRS), (b) now working in a position under CSRS, or (c) recovered from the disability for which you retired. After reaching age 62 you will not be eligible to have your disability annuity reinstated, however you will be eligible for a deferred annuity as explained on page one of this notice.

If you are reemployed in a Federal Government position that is not under the Civil Service Retirement System, you can have your disability annuity reinstated but you cannot receive any payment of the reinstated benefit until that employment ends. Reinstatement of the disability annuity restores life insurance and health benefits coverages if you were enrolled in these programs on the date your disability annuity terminated.

If, in the future, you believe you meet the conditions for reinstatement of disability annuity, call (202) 632-7700 or write to:

Office of Personnel Management
Civil Service Retirement System
Employee Service and Records Center
P.O. Box 45
Boyers, PA 16017

We will inform you at that time what evidence is required from you to show your eligibility for reinstatement of retirement benefits.

Reemployment

As an employee retired for disability, you are entitled to placement assistance under the Displaced Employee Program. This right continues after your annuity is terminated for restoration to earning capacity. You must apply for such assistance by filing Standard Form 171 Personal Qualifications Statement, with your former employing agency. If you are unable to obtain guidance from your agency, you may file the form with the Office of Personnel Management area office closest to you. You may apply for placement assistance at any time up to 90 days after your disability annuity stops. You are eligible for placement under this program for up to two years after you register.

Reconsideration Right

You have the right to request reconsideration of our decision to stop your disability annuity.

If you wish to do this you must follow the procedures listed below, as provided for in the Office of Personnel Management (OPM) regulations (5 CFR, Part 831).

1. Make your request in writing and include your name, address, date of birth, claim number, and the reasons for your request.
2. If your request for reconsideration is based on a change in the amount of income reported, please include evidence such as an earnings statement (W2) or a copy of your income tax return which will verify the correct earnings amount.

3. Your request must be postmarked within 30 days from the date of this notice (date shown at the top of page 1). The time limit may be extended, however, if you can show that you were not notified of the time limit or were prevented from writing due to a cause beyond your control.
4. Send your request for reconsideration to:

   Office of Personnel Management
   Civil Service Retirement System
   Employee Service and Records Center
   P.O. Box 107
   Boyers, PA 16017

After reconsideration, OPM will send you a final decision in writing.

Sincerely,

Chief, Retirement Inspection Branch
Operations Support Division

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-3243

CHARLES RICHMOND, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

[Filed Dec. 2, 1988]

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). SF831L8710762

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

REVERSED AND REMANDED.

ENTERED BY ORDER
OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: Dec. 2, 1988

ISSUED AS A MANDATE: February 10, 1989

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-3243

CHARLES RICHMOND, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

[Filed: Feb. 3, 1989]

Before: NICHOLS, *Senior Judge,* MAYER and MICHEL, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and same hereby is, denied.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

February 3, 1989

cc: Charles Richmond
Robert A. Reutershan

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number SF831L8710762

CHARLES R. RICHMOND, APPELLANT

v.

OFFICE OF PERSONNEL MANAGEMENT, AGENCY
CSA 2 452 152

[Date: Mar. 25, 1988]

Before: DANIEL R. LEVINSON, Chairman, MARIA L. JOHNSON, Vice Chairman.

ORDER

After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued on October 14, 1987, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the

petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD: /s/ William McCartney
for ROBERT E. TAYLOR
Clerk of the Board

Washington, D.C.

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No. 88-1943

In The

Supreme Court of the United States

October Term, 1988

OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

CHARLES RICHMOND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The government's Question Presented section over-simplifies the several issues which it wishes the Court to address. A more appropriate statement follows:

1. Whether equitable estoppel may ever lie against the federal government.

2. Whether reliance on the published statement of the responsible federal agency, in response to specific inquiries from a disabled federal retiree and with the result that the retiree was deprived of a portion of his annuity, was reasonable and detrimental.

3. Whether the government engaged in affirmative misconduct.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Under the federal government's disability retirement program, a federal employee with five or more years of civilian service who is found disabled may retire and receive an annuity. 5 U.S.C. § 8337(a). If the retiree either recovers from his disability or has his earning capacity restored, his annuity is terminated. 5 U.S.C. § 8337(d); 5 C.F.R. § 831.502(f)(5); see also, e.g., *Lancellotti v. OPM*, 704 F.2d 91, 93 (3d Cir. 1983). In the latter event, discontinuance of the annuity begins six months after the end of the calendar year in which the earning capacity

was restored. 5 U.S.C. § 8337(d); 5 C.F.R. § 831.502(e)(3). Conversely, if earning capacity is again lost, the annuity recommences. 5 C.F.R. § 831.502(g)(2).

Eligibility is thus premised on two separate factors, the categorical requirement of disability and the income requirement established by the lost earning capacity rule. See *Crockett v. OPM*, 783 F.2d 193, 195 (Fed.Cir. 1986). The statute includes an explicit definition for determining whether the retiree meets the income test:

> Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

5 U.S.C. § 8337(d); see also 5 C.F.R. § 831.502(e)(3). It is thus a flexible limit which changes each year as the "current rate of pay of the position" formerly held by the retiree is enhanced by cost-of-living increases. See, e.g., *McLean v. OPM*, 800 F.2d 254, 255 (Fed.Cir. 1986). Accordingly, in order to know whether they will remain eligible, annuitants who are able to perform part-time or occasional work must keep abreast of the changing income limitations.

Prior to 1983, the definition of restored earning capacity had been narrower, thus allowing retirees greater latitude in their earnings. Under the prior wording, earning capacity was "deemed restored if in *each of 2 succeeding calendar years* the income . . . equals at least 80 percent of the current rate of pay . . . ." 5 U.S.C. § 8337(d) (1976 ed.) (emphasis supplied). The amendment (Pub. L. No. 97-253, § 302(a)(1), 96 Stat. 792 (1982)) thus changed

the frame of reference from two consecutive one-year periods to a single one-year period; as a result, instead of an annuity continuing when income exceeded the 80% limit in one year (assuming it remained below the limit in the next), it was terminated when the limit was reached in any given year. Compare 5 C.F.R. § 831.502(e)(2) (pre-1983 rule) with *id.*, § 831.502(e)(3) (post-1982 rule).

2. Respondent Charles Richmond, a Vietnam veteran, was formerly a civilian welder employed by the United States Department of the Navy. Richmond Appeal to Merit Systems Protection Board (MSPB) (July 3, 1987). Because of vision problems which were seriously aggravated by the conditions inherent in the nature of his occupation, he had to retire in 1981. Accordingly, since his disability prevented him from doing his work, he was found eligible by the petitioner, the Office of Personnel Management (OPM), for a permanent disability annuity, pursuant to 5 U.S.C. § 8337(a). Appendix to Petition for Certiorari (App.) 21a.

From 1982 through 1985, working as a part-time school bus driver, he had an annual average income of $12,494. App. 21a. Because of his disability and because his earnings were therefore considerably below 80% of the current pay scale of his former job with the Navy, he received the annuity every year up to 1987.

His income for 1986 was $19,936, which was higher than in the past because he accepted additional work, "overtime that was not available in other years." App. 12a; see also App. 21a. Because 80% of the 1986 level for his previous position was $19,016.74, OPM determined that his earnings in 1986 had exceeded the limit and

terminated his annuity six months after the end of 1986. App. 21a. Conversely, because his income in 1987 was only about $15,000 (App. 21a), and therefore well below the 80% limit for that year, his annuity was restored beginning in 1988. App. 1a n.1.

3. Mr. Richmond's acceptance of the additional work in 1986 put him over the limit by about $920; his earning capacity in that year was 83.9% of the level of his former job. By thus barely exceeding the 80% limit, he lost half of his annual annuity. See 5 U.S.C. § 8339.

This seemingly counter-productive process, by which he received wages slightly over the earning capacity limit in exchange for a 50% cut in his disability payments, was caused not by any misunderstanding on his part, but by blatantly incorrect information consistently provided to him by his former governmental employer and OPM. App. 21a-22a. Four years after § 8337(d) was amended to restrict the earning capacity test to a year-by-year analysis, Mr. Richmond had twice visited the site of his former employment at the Naval Public Works Center in San Diego in an effort to determine the exact contours of the eligibility requirements. As he had the opportunity in 1986 only for additional employment as a driver, he sought to determine how this temporary work would affect his rights to the annuity. Richmond Request for Reconsideration to OPM (May 29, 1987).

On both occasions, he spoke with the individuals responsible for providing this kind of information, the Navy Employee Relations Specialists. He specifically inquired about the earning capacity rules. App. 2a, 21a. In response, they informed him orally that a disability

retiree's earning capacity was evaluated by reference to two successive years; only if earnings in each year exceeded the limit in each year would earning capacity be deemed to be restored and the annuity terminated. To definitively establish that this was in fact the rule, he was given, on both occasions, the official OPM publication on this issue, Federal Personnel Manual (FPM) Letter 831-64, Attachment 4, which also stated that earning capacity was measured by reference to each of two consecutive years. App. 22a. The FPM Letter had been correct when it was published in 1981, prior to the amendment to § 8337, but OPM had not changed it in the years between that amendment and Mr. Richmond's effort to determine the eligibility rules.

Relying on this erroneous written and oral information, Mr. Richmond accepted the additional work in 1986. He believed that it "would temporarily increase his income, but would not cause loss of his disability benefits." App. 3a. Indeed, based on the information repeatedly imparted to him, his earnings were never close to the limit. In both the years before and after 1986, which were relevant pursuant to FPM Letter 831-64, his earnings were well below the statutory limit; his 1986 earnings, as he was thus led to believe, should have had no effect on his continued right to an annuity. As a consequence of that extra work, however, his earnings were slightly over the limit; he lost half of his 1987 annuity because of "misinformation upon which he relied . . . ." App. 22a.

4. By letter dated May 12, 1987, OPM informed him for the first time that the law actually required evaluation of earnings on a year-by-year basis. Given his earnings in 1986, he was therefore "considered to be restored to

earning capacity and . . . no longer entitled to continue receiving a monthly disability annuity benefit, even though your medical condition may not have changed." App. 25a.

He appealed to the MSPB on the ground that the government should not be permitted to apply the revised § 8337 when it had consistently given him contrary information based on the previous version of § 8337. This argument was rejected by an administrative judge (App. 20a), and that decision became final when the MSPB denied his petition for review. App. 32a. His timely appeal to the Federal Circuit, for which he continued to represent himself, resulted in reversal of OPM's decision.

The majority opinion noted initially that this Court had recently refused to accede to the government's urging that equitable estoppel should never apply against the government. App. 4a-5a. It then held that the traditional elements of estoppel had been met: the government knew after 1982 that the earning capacity test required examination of each year's earnings; the government consistently gave Mr. Richmond the wrong information about the test with the intent that he rely on it; and Mr. Richmond reasonably relied on that misinformation and thereby changed his position for the worse. App. 9a.

Next, the Court of Appeals determined that the government's behavior was sufficiently egregious as to satisfy the additional requirement, established by this Court, of affirmative misconduct:

> [T]he government's action in providing Richmond with an OPM letter which summarized a law which had been changed some 4 years earlier is sufficient "misconduct" for estoppel to apply. To provide such a letter to an individual who apparently made specific requests for current written information through what appeared to be the correct channels is reckless, at the very least.

App. 9a-10a; see also App. 14a.

The majority made several other noteworthy observations drawing on this Court's estoppel holdings and their applicability to this case. First, they noted that "the logic of the landmark decisions leads to the conclusion that the most crucial consideration is the objective reasonableness of the reliance." App. 11a-12a. Reliance on solely oral advice, or on advice "from persons who were not cloaked with the mantle of authority to speak for the government as to legal requirements," has not been deemed reasonable – but those facts were not present here. App. 12a.

Secondly, the majority repudiated the suggestion made by the dissent (and repeated here by the government) that Mr. Richmond's action was manipulative. They pointed out that his increase in earnings was only temporary, and that this was not an instance where an annuitant had declined a raise or a new permanent position in order to maintain an artificially low salary. He was trying merely to determine the eligibility conditions, and, based on that determination, to make a rational decision as to whether he should accept temporary, additional work. App. 12a.

Finally, the court observed that it was inappropriate to treat his reliance as unreasonable on the theory that knowledge of the law is presumed. Mr. Richmond could

not be expected "to know the specific statutory provisions as they change from time to time . . . ." App. 13a. Indeed, he sought assistance from the very government sources which are authorized to supply this information, and they provided written confirmation of the eligibility conditions. App. 13a.

Given these "unusual and extreme" factors, the court concluded, this was a proper instance to estop the government: "Estoppel, after all, being equitable, necessarily is based on preserving fairness on the specific facts of the case before the court." App. 14a.

The dissenting judge premised his contrary conclusion on a belief that Mr. Richmond had engaged in some sort of "abuse", an effort to "gerrymand . . . earnings to get extra money from the taxpayers." App. 19a. Thus, underlying his legal analysis is the insinuation that Mr. Richmond did not come before the court with clean hands and is therefore not deserving of equitable relief.

The government petitioned the panel for rehearing, and that was denied. App. 31a.

REASONS FOR DENYING THE WRIT

I. THE GOVERNMENT'S EFFORT TO IMPUGN MR. RICHMOND'S MOTIVES SHOULD BE REJECTED AND SHOULD NOT OBSCURE THE FACT THAT IT WAS THE GOVERNMENT'S MISCONDUCT WHICH CREATED THIS SITUATION

The government has taken a relatively simple case, with the barest of records, and asked this Court to use it

as a vehicle to effect major policy reversals with respect to the doctrine of equitable estoppel. In making this effort, it has sought to malign the respondent, apparently in order to suggest that equitable relief is inappropriate and to distract attention from its own misbehavior.

The record does disclose that this is a straightforward instance of repeated, longstanding, and inexcusable behavior by a government agency, with the direct result that a permanently disabled federal retiree, who had done everything possible to inform himself of relevant eligibility conditions, lost a substantial portion of his annual income. In the government's twisting of events, however, the equities have been reversed, with the disabled annuitant a manipulator (Petition at 14) and the government exonerated from any wrongdoing because "[r]eliance on the words of a government employee . . . can never be reasonable. . . ." Petition at 12. Before proceeding further, therefore, it is imperative to correct the misperceptions and innuendoes presented in the Petition.

The government states:

> At the heart of this lawsuit is respondent's complaint that he missed the opportunity to manipulate the law for his personal gain . . . .This desire to work the system as close to the edge as possible, while not illegal, is surely not the type of detriment that traditionally supports an estoppel.

Petition at 14-15. Given this assumption that Mr. Richmond was acting improperly, it is not surprising that the government has also misstated the nature of the disability

program, as it expressly equates "a restored capacity to earn" with "a loss of disability." Petition at 15.

The inaccuracy of these remarks is easily seen. First, the two eligibility conditions of § 8337 are separate and unrelated factors: "The rationale underlying disability retirement benefits is not compensation simply for having a disability. The disability must be coupled with a substantial inability to earn income." *Crockett v. OPM*, 783 F.2d at 195. Consequently, the restoration of earning capacity does not in any way suggest that the disability has ended. See OPM's Notice of May 12, 1987 to Mr. Richmond (App. 25a). The government's insinuation that Mr. Richmond ceased to be disabled and was improperly trying to live off the taxpayers is therefore as inaccurate as it is objectionable. His continued disability has never been in question.

The complementary position is also wrong. The government suggests that Mr. Richmond was attempting to earn as close to the limit as possible and therefore the equities do not demand redress for him when he mistakenly went over the limit. Mr. Richmond, however, was nowhere near the limit which he believed to be in effect. Had he been so intent on manipulating the system, it seems unlikely that his earnings in 1986 would have been only a few percentage points over the 80% level; given his belief that his earnings could surpass the 80% level in one year without limitation as long as they fell below in the next, he could have earned considerably more with no impact – he believed – on his annuity.

Moreover, it is undisputed that in the years before and after 1986 his earnings were well below the 80%

limit. To term this a "desire to work the system as close to the edge as possible" is demonstrative not of Mr. Richmond's intentions, but of the government's decision to malign him as a means of improving the balance of equities.

It is quite apparent why Mr. Richmond sought assistance from the government, and it was neither reprehensible nor in bad faith. It was, instead, an entirely rational act. For four years his earnings from part-time employment had been well below the limit. When it became apparent that he might be able to obtain temporary additional employment in 1986, he sought to determine what effect, if any, that would have on his annuity. Informed for all practical purposes that he could earn without limit in 1986, he accepted the additional work. As the majority noted below, this was *not* an instance where "an annuitant was offered a raise that would put him permanently over the limit, but asked the employer to decrease the raise so as to maintain eligibility." App. 12a. Rather, this was a logical decision to accept one-time-only work because it would not, he was informed, affect his annuity status.

Instead of employing a subjective or many-factored test for determining the restoration of earning capacity, Congress established the 80% level as a simple objective measurement. Using such a blunt demarcation inevitably results in some annuitants falling just above or below the line. See, e.g., *Lancellotti v. OPM*, 704 F.2d at 99-100. Given the importance of that limit, therefore, it is entirely reasonable for annuitants to familiarize themselves with the

rules and to take them into consideration when evaluating temporary work opportunities.[1]

Thus, the Court should recognize that Mr. Richmond's behavior was a logical response to his situation; he was merely attempting to establish his options. The issue of this case is not Mr. Richmond's rational effort to obtain relevant information, but the government's consistently inaccurate responses to his inquiries.

II. ON NEITHER BROAD NOR NARROW GROUNDS IS THERE ANY BASIS FOR REVIEWING THE DECISION BELOW

This case presents a relatively simple instance of estoppel because of affirmative misconduct. The government's response, however, is a sweeping attack on every aspect of the decision below, including the very concept of estoppel against the government. But this case is inappropriate for such extensive policy determinations. If the Court is to consider repudiating its prior holdings on the applicability of estoppel and other equitable approaches to governmental misdeeds, its vehicle should have a fully developed record and history. While important to Mr. Richmond, of course, this case is not the significant litigation from which this Court should launch major analyses of long-established doctrines. Compare, e.g., *Watkins v.*

[1] The earning capacity test resembles the excess earnings test for recipients of Social Security retirement. Under that rule, each dollar earned above a certain limit results in a 50% reduction in benefits. 42 U.S.C. § 403(f)(3). It has never been suggested that it is improper for these recipients to restrict the amount of their work in order to avoid exceeding the limit.

U.S. Army, 875 F.2d 699 (9th Cir. 1989) (*en banc* court splits 6-5 in favor of estopping the Army).

1. The government first contends that this Court should expressly reject estoppel against the government because, "[s]ince its earliest cases, this Court has ruled that the government may not be estopped from enforcing the laws." Petition at 8 (footnote omitted). That is a misstatement. Moreover, the conclusion has been rejected before by this Court, and no new rationale has been offered for a different result.

In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984), the Court observed that, in at least two cases, it had held "that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." In one of those decisions, *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674 (1973) ("*PICCO*"), this Court determined that when the government, by longstanding construction of a statute, had "affirmatively misled" a corporation into believing that its actions were not criminal, "traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."

That the decision rests on equitable estoppel principles is apparent not only from the nature of the potential remedy, but also from the Court's citation to two law review articles on estoppel and, most importantly, from the discussion as to whether there was reasonable reliance. 411 U.S. at 674, 675. The suggestion that the government might have "affirmatively misled" the corporation is also consistent with the affirmative misconduct

language which this Court has employed in a more general sense.[2]

In addition to repudiating the government's contention that this Court has never found an estoppel against the government, *PICCO* is significant for another reason: it bears a striking similarity to the instant case on a critical point. Like Mr. Richmond, the corporation was expressly informed in written materials by the "responsible administrative agency" (411 U.S. at 674) that the statute had a particular meaning – a meaning which the government later disavowed. And, like Mr. Richmond, the company took action in reliance for which the government later sought to hold it responsible. This Court, however, viewed notions of fairness and equity as providing a rationale to prohibit the government from applying the statute as written. That willingness contradicts the government's contention here that it "cannot be estopped from enforcing a lawful statute . . . ." Petition at 10.

The other case cited in *Community Health Services* is *Moser v. United States*, 341 U.S. 41 (1951). Although the Court there purported not to evaluate under estoppel principles, see *id.* at 47, its analysis of the equities produced a result no different than would have flowed from an equitable estoppel approach. It is not surprising, then,

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[2] The concurrence in *Community Health Services* states without elaboration that *PICCO* is not a "traditional equitable estoppel case." 467 U.S. at 68 (Rehnquist, J., concurring in the judgment). But the discussion of reliance and of the corporation being affirmatively misled belies that characterization.

that this Court recognized *Moser* in the *Community Health Services* discussion.

Moser too is strongly supportive of the respondent's argument here. In that case, the law permitted "a choice of exemption [from the draft] and no citizenship, or no exemption and citizenship," 341 U.S. at 46, but the form signed by the claimant did not state that claiming the exemption created a statutory bar to citizenship. Because the form failed to indicate that he was signing away this right, however, the Court determined that "elementary fairness" required that he be naturalized. *Id.* at 47.

Although the benefits at issue are different, the structure of *Moser* is very similar to that in this case. In both instances, the claimant enjoyed a right to the benefit, and that benefit was lost solely because of the incorrect information provided by the government. Both sought the needed information from the proper source, and both received the wrong information. See *id.* at 46. Just as Mr. Moser relied on the government to sign a form which he would otherwise not have signed (*ibid.*), so too did Mr. Richmond take action (additional work) which he otherwise would not have taken. In both instances, the "justifiable reliance" (*ibid.*) was the inducement for an action which deprived them of a right to which they were previously entitled. This Court's recognition of the distinction between the lack of loss in *Community Health Services* and the loss of a vested right in *Moser* (467 U.S. at 62 n.14) directly supports the application of estoppel here, where, as in *Moser*, a vested right was lost.[3]

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[3] In addition to these cases, this Court has applied similar equitable principles with comparable results in other instances.

(Continued on following page)

The government argues also that the alleged "rule prohibiting estoppel is critical to the government's effective operation." Petition at 10. Presumably, it made the same contention in *Community Health Services*, but this Court expressly declined to embrace "a flat rule" against estopping the government. 467 U.S. at 60. The Court there noted that the "interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government" precluded it from concluding that estoppel should never lie. *Ibid.* (footnote omitted).

Accordingly, the lower courts have continued to consider estoppel as potentially applicable against the government. See, e.g., cases cited in Petition at 19-22. There is no evidence that these occasional determinations have crippled the government's effective operation. The government has always operated with the possibility of its

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(Continued from previous page)

In *Honda v. Clark*, 386 U.S. 484, 486 (1967), the Court declined to employ estoppel language, but, as one commentator has observed, "its action was an estoppel in all but name." Note, *Equitable Estoppel of the Government*, 79 Colum.L.Rev. 551, 567 n.104 (1979). The Court relied on the "equitable doctrine of tolling" to allow potential beneficiaries who had not filed their claims within the statutory time limit to pursue their rights.

Also on point is a recent unanimous decision relying on *Honda*. In *Bowen v. City of New York*, 476 U.S. 467, 480-481 (1986), the Court again tolled a statutory time limit for filing, citing the government's misconduct in following a secret policy. The Court repudiated the suggestion, also made here (see Petition at 10, 11), that equitable doctrines are inapplicable where payment from the treasury would result. 476 U.S. at 479.

actions being estopped, and there has been no indication of impending chaos as a result.

The government's rhetorical flourishes ignore the underlying premise of equitable estoppel and its relatively minimal impact on governmental operations. In *Community Health Services*, 467 U.S. at 59, this Court stated: "Estoppel is an equitable doctrine invoked to avoid injustice in particular cases. . . .[A] hallmark of the doctrine is its flexible application . . . ." Yet the government claims that its very existence threatens governmental operation. The fact is, though, that estoppel is only infrequently applied to the government. See, e.g., App. 14a ("unusual and extreme" facts below warranted estoppel). With this Court's added requirement of "affirmative misconduct", there will be relatively few situations which meet the test. See Note, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U.Chi.L.Rev. 1026, 1046-1047 (1986). But, on those rare occasions where the injustice produced by improper governmental behavior demands that equitable considerations take precedence, estoppel should continue to be available.

In light of the history of estoppel against the government, in this Court and in the lower courts, no reason exists to eradicate this already narrowly tailored mechanism. Just as the Court saw no reason to take such a drastic step in *Community Health Services*, so too should it reject the government's broad attack here and deny the petition.

2. The government's second contention is that the reliance in this instance was neither reasonable nor detrimental. Petition at 12-15. It relies primarily on *Community Health Services*, but fails to note the significant differences between the situations.

First, a crucial component of this Court's decision was that the party seeking estoppel *never* had entitlement to the payments at issue, so that receiving those payments meant that "the consequences of the Government's misconduct were not entirely adverse." 467 U.S. at 61. The private party had the use of government funds for a lengthy period of time; it "lost no rights but merely was induced to do something which could be corrected at a later time." *Id.* at 62.

Mr. Richmond's situation differs in every respect. The payments at issue here were his: he had a vested right to them as a federal retiree who met all the eligibility conditions. Far from being misled into accepting funds to which he was not entitled, he was induced to take action which deprived him of his existing entitlement. He would have been better off had he not sought assistance from the government, because that action led directly to his loss of entitlement. In that regard, this situation satisfies precisely the standard established by this Court: "When a private party is deprived of something to which it was entitled of right, it has surely suffered a detrimental change in its position." *Id.* at 62.

Morever, unlike in *Community Health Services*, 467 U.S. at 62 & n.15, and in *Schweiker v. Hansen*, 450 U.S. 785,

789 (1981), once he had relied on the government and taken action, the effect could never be corrected. Under the statutory scheme, his acceptance of additional work deprived him of his annuity; he could not simply return the money, as in *Community Health Services*, or file an application, as in *Hansen*. The corporation and Mrs. Hansen relied passively by doing nothing to affect eligibility which they had never possessed in the first place; Mr. Richmond was in the opposite situation: he took action in reliance which deprived him of existing eligibility.

Secondly, the reliance here was based on a written document, a distinction cited as relevant by the court below. App. 10a-11a. The government attempts to infer a significant departure from other cases in that analysis (see Petition at 12-13), but the court was not, as the government trumpets, suggesting that all inaccurate written advice mandates estoppel. It was simply observing that written advice is more compelling and therefore more appropriate for applying estoppel, as this Court has consistently indicated. *Community Health Services*, 467 U.S. at 65; *Hansen*, 450 U.S. at 788.

Contrary to the government's argument, this was not a situation where a potential beneficiary simply picked up an "out-of-date circular[ ]." Petition at 13. Mr. Richmond asked specific questions, and received the FPM Letter in direct response to those questions. OPM had not bothered to correct it in four years, which contrasts with this Court's tolerance of the failure to provide correct information after a "recent amendment" (1-1/2 years

before). *Hansen*, 450 U.S. at 789. Finding the government estopped in these circumstances was not an abandonment of precedent, and the government greatly overstates the significance of the decision below by claiming that it will "confer[ ] estoppel claims on any number of individuals . . . ." Petition at 13.

This case also significantly differs from *Community Health Services* because of the nature of the information sought. The corporation in that case asked for clarification of an ambiguous federal policy from a non-governmental agent:

> As a recipient of public funds well acquainted with the role of a fiscal intermediary, [Community Health Services] knew [that the intermediary] acted only as a conduit; it could not resolve policy questions . . . .Yet [Community Health Services] made no attempt to have the question resolved by the Secretary; it was satisfied with the policy judgment of a mere conduit.

467 U.S. at 64-65.

The difference is dramatic. Mr. Richmond sought not a policy clarification, but a simple eligibility condition which required no legal interpretation and which was explicitly set out in the statute. He sought it from the government itself, and received the response both from his former employer and from the agency expressly authorized to provide such information. This was neither a complicated situation nor one which should have suggested to him that additional steps should be taken. He went twice to the proper source, and received the same information on both occasions, orally and in writing. These factors stand in sharp contrast with the lax actions

of a sophisticated institution which dealt regularly with the government and was fully aware that it was seeking an interpretation of a complex area from a non-governmental intermediary.[4]

Mr. Richmond lost thousands of dollars because he undercut his established entitlement by relying on the consistent written statements of the responsible governmental authorities. His reliance was reasonable and detrimental, and that factor therefore provides no basis for granting the petition.

3. The government claims finally that its action here does not rise to the level of affirmative misconduct, and that, in any event, clarification of that standard demands review.[5]

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[4] The suggestion that Mr. Richmond had the same obligation as a company conducting business with the government under the Medicare statute (see Petition at 12) is unrealistic. The court below correctly recognized that an individual annuitant is not similarly situated and cannot be saddled with the same presumptions. App. 13a. The government's view of "reasonable" reliance would render it impossible to satisfy that standard in *any* circumstance where the information provided differed from statutory authority.

[5] To the extent that the government contends that there may never be affirmative misconduct where an estoppel would interfere with the execution of the laws (see Petition at 16), the argument has essentially been repudiated by this Court's holdings in such cases as *PICCO*, *Moser*, and *City of New York*. See *supra*, at 15 & n.3. The commentators have uniformly agreed that estoppel against the government is appropriate "in order to vindicate the more fundamental purposes of a statute." Note, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53

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a. By the latter contention, the government is again seeking a simplistic and virtually impregnable rule. This contradicts the very nature of the estoppel doctrine, however, which is "equitable," "flexible," and geared to "particular cases." *Community Health Services*, 467 U.S. at 59; see also, e.g., App. 5a ("courts of appeals have determined whether, on the facts of a given case, estoppel should be applied against the government"). As a consequence, action which might be considered affirmative misconduct in one case should not necessarily be so considered in another context.

For instance, as the court below held, providing a blatantly inaccurate written statement of eligibility conditions, which has been out of date for four years, to a beneficiary untrained in the law, is the kind of reckless behavior which amounts to affirmative misconduct. App. 9a-10a. But the same failings directed at a corporate entity with in-house counsel would not necessarily be so defined.

The existence of affirmative misconduct depends upon a variety of factors, such as who provided the information, in what form, when, how often, to whom, and in response to what specific inquiry (if any). These and other considerations cannot realistically be incorporated into a simple definition. The complexities inherent in a flexible concept such as estoppel preclude establishing a strict definition. While that fluidity may sometimes

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U.Chi.L.Rev. 1026, 1043 (1986); see also, e.g., Note, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?*, 56 St.John's L.Rev. 114, 135 (1981); Note, *Equitable Estoppel of the Government*, 79 Colum.L.Rev. 551, 566 (1979).

appear to suggest only that courts "will know an estoppel when [they] see one," *Hansen*, 450 U.S. at 792 (Marshall, J., dissenting), the alternative, an unyielding definition which will occasion a loss of estoppel's traditional flexibility, is less desirable.[6]

b. The government also contends that there cannot be affirmative misconduct here because of the alleged similarities to *Hansen*. Petition at 17-18. The differences are major, however. First, the information here was provided in written form from the responsible agency. That does not always mean that the misconduct was affirmative, but there is no dispute that a writing is more strongly suggestive of that determination. See *Hansen*, 450 U.S. at 788.

Secondly, this is not an instance where the claimant's confusion or other mitigating circumstances induced a low-level official to provide incorrect or misleading information, which would dilute the government's burden. *Id.* at 789; see also *id.* at 795 (Marshall, J., dissenting). There has never been any dispute that Mr. Richmond made specific inquiries about discrete eligibility conditions. The change in the law was not "recent", as in *Hansen*, and the

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[6] Contrary to the government's statement that success on an estoppel claim may depend "on the federal court in which it is heard" (Petition at 23), the outcome is more likely to depend on the wide variety of relevant facts which are invariably raised in such cases. Accord, *Watkins v. U.S. Army*, 875 F.2d at 707 (in detecting affirmative misconduct, "each case must be decided on its own particular facts and circumstances").

response came both from trained specialists and in writing from the responsible federal agency. There is no question that the government was entirely at fault, for it had taken no action to correct inaccurate written information for four years.

Moreover, this was not a "minor breach" of internal agency policy for which estopping the government would henceforth require its agents to "follow instructions to the last detail . . . ." *Id.* at 789-790. This was a blatant misstatement of a key eligibility condition; correctly imparting this crucial change in the law should have been a major goal for OPM, and its long-term failure in this regard is far removed from the "detail" overlooked in *Hansen*.

Finally, the government's conduct here caused the loss of eligibility which could not be corrected. The necessary effect of the misinformation was not a failure to take action which would have led to eligibility, as was the case in *Hansen*; here, Mr. Richmond was induced to take action which resulted in a loss of eligibility that could never be altered. Once he had performed the additional work, he could not, under the statutory scheme, retrieve his lost benefits. By contrast, Mrs. Hansen, who could not be eligible until she applied (see *id.* at 790), could have, at any time, corrected the situation simply by applying. In short, the government's action in *Hansen* discouraged the attainment of eligibility, but here it caused the loss of

eligibility. As this Court's analysis in *Hansen* suggests, this is a far more serious form of misconduct.[7]

The misconduct here was considerably more egregious than a one-time negligent act, for it caused the permanent deprivation of an entitlement which was Mr. Richmond's before he sought assistance from the government. It was "reckless", as the court below found, and there is no basis for disturbing that holding.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1989

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[7] The other decisions relied on by the government (Petition at 17 & n.10) likewise involve situations where the governmental misconduct did not deprive the claimant of a right or benefit to which he was already statutorily entitled, but, rather, either discouraged him from attaining a benefit for which he was not yet eligible or led him to believe that he was eligible for a benefit that was legally unattainable. Other significant distinctions also are apparent; for instance, in *Montana v. Kennedy*, 366 U.S. 308, 314 (1961), the oral statement on which reliance was premised "may have been only the consular official's well-meant advice" rather than the statement of law that it was understood to be.

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No. 88-1943

In the Supreme Court of the United States

OCTOBER TERM, 1989

OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

CHARLES RICHMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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We emphasized in our petition that this is a classically simple case, and that because of its simplicity the application of this Court's equitable estoppel precedents is straightforward. The principal holding of the divided court of appeals is that a statute limiting the wages a disability annuitant may earn will not be applied when a government agent has negligently provided the annuitant with misinformation about the statute. We argued that certiorari is warranted because of the conflict between the judgment below and the holdings of this Court, and because of the confused state of the law on this important issue in the courts of appeals.

The respondent has advanced several arguments in answer to the government's petition. None, however, effectively responds to the reasons for granting the petition.

1. a. Respondent's principal argument rests, ironically, on the ordinariness of his case. Respondent admonishes the government for using this "simple instance" of government "affirmative misconduct" as justification for "a sweeping attack on every aspect of the decision below" (Br. in Opp. 12). Yet it is precisely the "simple" nature of this case that prompts the government to seek further review. Respondent has never claimed that the government agent purposefully or maliciously gave him misinformation. Rather, he has made his case turn on the fact that the information provided to him was wrong. This is precisely the type of situation where this Court has repeatedly declined to estop the government.

In *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380 (1947), a government agent incorrectly informed a wheat farmer that his crop would be federally insured, although applicable regulations clearly provided that the crop was not insurable. No estoppel was found to be warranted. In *Montana* v. *Kennedy,* 366 U.S. 308 (1961), a United States consular official in Italy incorrectly informed the petitioner's mother, a native-born citizen of the United States, that because she was pregnant, he was unable to issue her a passport allowing her to return to the United States. The Court held that the officer's misstatement of the relevant law "falls far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth" as a basis for denying him citizenship. 366 U.S. at 314-315. In the case perhaps most directly applicable here, *Schweiker* v. *Hansen,* 450 U.S. 785 (1981) (per curiam), a Social Security claims representative incorrectly informed a claimant that she did not qualify for insurance benefits and failed to advise her that she should file a written application for benefits, although instructions in the Social Security Administration's Claims Manual directed claims representatives to give such advice. The Court concluded that the government representative's erroneous advice and failure to take steps to discover the correct information fell " 'far short' of conduct which would raise a serious question whether [the government] is estopped from insisting upon compliance with [the law]." *Schweiker* v. *Hansen,* 450 U.S. at 790 (quoting *Montana* v. *Kennedy,* 366 U.S. at 314). Most recently, in *Heckler* v. *Community Health Services,* 467 U.S. 51 (1984), the Court found a pattern of misleading information by a Medicare intermediary insufficient to estop the Secretary of Health and Human Services from enforcing the Medicare statute and regulations.

Under these decisions, an estoppel cannot be imposed against the government solely on the basis that misinformation has been given an individual as a result of ordinary negligence—the exact case presented here.

b. It is precisely the ordinary nature of the negligence at issue that makes this an appropriate case for review. Since the court of appeals elevated ordinary negligence into "affirmative misconduct," this case provides an excellent vehicle for considering whether such misconduct can ever estop the government, and if so, what the governing standard should be.

2. a. Respondent suggests that this case differs from other government estoppel cases that have been before the Court. Thus he argues that *Heckler* v. *Community Health Services, supra,* is inapposite because the party seeking to estop the government in that case had no "entitlement" to the benefits sought, while here respondent "had a vested right to [annuity benefits] as a federal retiree who met all the eligibility conditions" (Br. in Opp. 18).

Respondent's perceived distinction between this case and *Community Health Services*—that here benefits had

vested—begs the very question at issue. The government's position is that respondent was *not* entitled to the annuity for the period in question, because he did not meet the clear statutory requirements for entitlement. Indeed, only the specific relief respondent seeks here—judicial imposition of an equitable estoppel—would permit him to receive these benefits, since the statutory language forbidding benefits in these circumstances is clear. Thus the question of respondent's eligibility—or lack of it—is the very issue presented to the Court.

b. Respondent also attempts to distinguish this case from *Community Health Services,* and from *Schweiker* v. *Hansen, supra,* by urging that "once he had relied on the government and taken action, the effect could never be corrected" (Br. in Opp. 19). He asserts that this was not the case in *Community Health Services* or *Schweiker;* that the not-for-profit hospital in *Community Health Services* could simply return the money wrongfully received, and Ms. Hansen could have simply "file[d] an application" for benefits (*ibid.*). It is true that once respondent exceeded the statutory limit he lost his claim for benefits for a six-month period. However, it is equally true that for every day Ms. Hansen did not apply for benefits because of misinformation, her benefits were irretrievably lost. Similarly, the not-for-profit hospital in *Community Health Services* lost funds it deemed itself entitled to on the basis of erroneous government advice—funds that the hospital claimed it had spent on services to the public, and that would have been financially ruinous to pay back. Respondent, therefore, fails to contend with the clear and precise holdings of this Court's rulings in those cases.

3. Respondent asserts that this Court has in fact estopped the government in the past, citing *Moser* v. *United States,* 341 U.S. 41 (1951), and *United States* v. *Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655 (1973).

However, neither of these decisions was an estoppel case. *Pennsylvania Industrial Chemical Corp.* was a criminal prosecution, presenting the question of the basis of criminal liability. The Court's decision rested on the absence of fair warning that the conduct in question was proscribed ("to the extent that [government regulations] deprived [the defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution)." 411 U.S. at 674. See *Community Health Services,* 467 U.S. at 68 (Rehnquist, J., concurring in the judgment).

Moser decided that an alien should not be held to have lost his opportunity for citizenship because he had sought an exemption from military service as a neutral alien. Expressly declining to base its decision on principles of estoppel, 341 U.S. at 47, the Court held that Moser had not knowingly and intentionally waived his right to citizenship, since he had not been advised that under governing law his conduct would result in such a waiver. The question in *Moser,* therefore, was, like the question of waiver of right to counsel, one that turned ultimately on the individual's state of mind. No one contends here that respondent's intention to earn more, or less, than the statutory maximum is a relevant issue under the statute itself.[1]

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[1] As Judge Friendly observed in his dissenting opinion, no Supreme Court case has ever gone counter to the holding in *Federal Crop Ins. Corp.* v. *Merrill, supra,* and while "some courts and commentators have sought to find a contrary indication in *Moser* v. *United States,* 341 U.S. 41, 47 (1951), * * * this is an instance of the wish being father to the thought." *Hansen* v. *Harris,* 619 F.2d 942, 950 (2d Cir. 1980), rev'd, 450 U.S. 785 (1981). See also, *Heckler* v. *Community Health Services,* 467 U.S. at 68 (Rehnquist, J., concurring in the judgment).

Moser and *Pennsylvania Industrial Chemical Corp.* are particularly inappropriate cases on which to erect an estoppel in this instance because neither of those decisions imposed financial liability on the government in circumstances not authorized by law. As noted in our petition (at 10 n.4), when Congress enacted the Federal Tort Claims Act it expressly exempted the United States from "[a]ny claim arising out of," *inter alia*, "misrepresentation" or "deceit." 28 U.S.C 2680(h). The congressional concerns that preclude tort remedies against the United States on the basis of misrepresentations by government agents also preclude an equitable estoppel against the government that would have the effect of charging the Treasury in violation of a specific statutory mandate. See *INS* v. *Pangilinan*, 108 S. Ct. 2210, 2216 (1988) ("[I]t is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.' ") (second brackets in original).[2]

4. Respondent asserts that the traditional elements of estoppel against a private party are present in this case. We argued in our petition that they were not (Pet. 12-15), and noted both that reliance under the circumstances here was not reasonable and that equitable considerations did not support an estoppel.[3]

But even if these traditional elements of private party estoppel are present, as respondent contends, the critical

[2] Respondent also cites, in support of his estoppel argument, the decisions of this Court in *Honda* v. *Clark*, 386 U.S. 484 (1967), and *Bowen* v. *City of New York*, 476 U.S. 467 (1986). However, these were both cases in which the Court found that tolling of the applicable limitations period was required by the statutory scheme itself. Moreover, in *Clark*, the Court specifically rejected an estoppel theory. See 386 U.S. at 500.

[3] As Judge Mayer observed in dissent below, "Congress certainly did not intend that beneficiaries gerrymand their earnings to get extra money from the taxpayers" (Pet. App. 19a).

questions remain whether estoppel is ever permissible against the government, and if so, what kind of additional showing must be made before such an estoppel can be imposed. Respondent does not dispute our contention that the courts of appeals are in disarray on those questions. The straightforward nature of this case makes it an especially appropriate vehicle for clarification of the law.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Office of Personnel Management can be equitably estopped from applying the requirements of 5 U.S.C. 8337(d) (1988), which mandate discontinuance of a disability annuity when the annuitant's earned income exceeds the maximum amount allowed under the statute.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1943

OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

CHARLES RICHMOND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 862 F.2d 294. The decision of the Merit Systems Protection Board's administrative judge (Pet. App. 20a-24a), and the denial of review by the Board (Pet. App. 32a-33a), are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on December 2, 1988. A petition for rehearing was denied on February 3, 1989 (Pet. App. 31a). On April 25, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 3, 1989. The petition for a writ of certiorari was filed on June 2, 1989, and was granted on October 2, 1989. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 8337(d) of Title 5, United States Code, as amended by Pub. L. No. 97-253, § 302(a), 96 Stat. 792, provides:

> If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, recovers from his disability, payment of the annuity terminates on reemployment by the Government or 1 year after the date of the medical examination showing the recovery, whichever is earlier. If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, is restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement, payment of the annuity terminates on reemployment by the Government or 180 days after the end of the calendar year in which earning capacity is so restored, whichever is earlier. Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

STATEMENT

In this case, the Court of Appeals for the Federal Circuit estopped the Office of Personnel Management (OPM) from applying the terms of 5 U.S.C. 8337(d) (1988).[1] Under the terms of that provision, a disability annuitant who earns more than a certain statutory limit on income in any one year is deemed restored to "[e]arning capacity," and therefore loses his or her disability annuity. In 1986, OPM discontinued respondent's annuity because he had earned more than the statutory limit. The court of appeals, however, ordered the withheld payments to be released because two Navy employees had incorrectly told respondent that his disability annuity would not be

[1] Unless otherwise noted, all references to Section 8337 of Title 5 are to the 1988 edition of the United States Code.

discontinued unless he earned more than the statutory limit during *two* consecutive years, and had also furnished respondent a circular reflecting the incorrect information. The court ruled that this behavior constituted sufficient "affirmative misconduct" to warrant an exception to the general rule that the government may not be estopped from enforcing the laws.

1. Congress has provided that federal employees who complete at least five years of service and become disabled may retire and receive a disability annuity. 5 U.S.C. 8337(a). If an annuitant under 60 years of age recovers from his or her disability, or is "restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement," the annuity terminates. 5 U.S.C. 8337(d).

An individual is deemed "restored to * * * earning capacity" if his wages for a given period of time exceed a specified statutory cap. Prior to 1982, the statute provided that an individual retired for disability was deemed "restored to * * * earning capacity," and thus no longer eligible for a disability annuity, if:

> *in each of 2 succeeding calendar years* the income of the annuitant from wages or self-employment * * * equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

5 U.S.C. 8337(d) (1976) (emphasis added).

The provision was amended in 1982 by the Omnibus Budget Reconciliation Act, Pub. L. No. 97-253, § 302(a)(2), 96 Stat. 792, to provide that if the statutory cap on earnings is exceeded in any one year, the annuity is to be terminated:

> Earning capacity is deemed restored if *in any calendar year* the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

5 U.S.C. 8337(d) (emphasis added).

Under Title 5, the disability annuity terminates 180 days after the end of the calendar year in which earning capacity is restored. 5 U.S.C. 8337(d). However, an annuitant who has not recovered from the disability for which he was retired may have his annuity restored "effective the first of the year following any calendar year in which his income from wages or self-employment or both is less than [the statutory limit]." 5 U.S.C. 8337(e).[2]

2. Respondent retired from his position as a welder with the Navy in 1981, after OPM had approved his application for disability retirement. In January 1986, respondent asked a Navy Employee Relations Specialist at the Navy Public Works Center in San Diego, California, for information about how much he could earn without exceeding the statutory limit. The Specialist erroneously told Richmond about the provisions of the pre-1982 version of Section 8337(d)—that his annuity would not be discontinued unless, in each of two succeeding years, he earned at least 80 percent of the current rate of pay for the position he held prior to retirement. Pet. App. 2a. The Specialist also gave respondent a copy of Attachment 4 to Federal Personnel Manual Letter 831-64 (1981), a publication of the Office of Personnal Management that, while correct when written, was no longer accurate.[3] It too explained the two-year rule of the pre-1982 statute. Pet. App. 2a & n.4. In January 1987, respondent again went to the Navy seeking advice on earnings. Another Employee Relations Specialist erroneously advised him of the two-year rule. Gov't C.A. App. 4-5; Pet. App. 10a-11a.

[2] The statutory requirements have been codified in regulations issued by OPM. See 5 C.F.R. 831.502 *et seq.* (1988). Under the regulations, disability annuitants under 60 years of age must annually report income from wages and/or self-employment during the previous calendar year, or forfeit the annuity. 5 C.F.R. 831.502(e) (1988).

[3] This attachment is reproduced in the appendix to this brief.

3. According to respondent, from 1982 through 1986, he earned an average of $12,494 per year by working as a school bus driver. See Pet. App. 21a. After receiving the erroneous information from the Navy and the OPM circular, respondent, in the year 1986, earned $19,936—more than the amount permitted by statute.[4] *Ibid.* As a result, OPM discontinued his annuity as of June 30, 1987. Pet. App. 25a-29a. However, because respondent earned less than the statutory cap on earnings in 1987, his disability annuity was restored as of January 1, 1988. Respondent, therefore, was without his annuity payments for a period of six months. Pet. App. 1a n.1.[5]

Respondent sought review of the OPM decision by the Merit Systems Protection Board (MSPB). He contended that OPM was equitably estopped from discontinuing his annuity payments because he had received misinformation from Federal Personnel Manual Letter 831-64, the circular given him by the Navy. An MSPB administrative judge rejected the estoppel claim, holding that "OPM cannot be estopped from enforcing a statutorily imposed requirement for retirement eligibility." Pet. App. 22a. In addition, the administrative judge found that respondent had demonstrated by virtue of his income that he had been restored to earning capacity in 1986 and "that he was not entitled to a continuation of that retirement annuity for that year." *Ibid.*

The MSPB denied respondent's petition for review (Pet. App. 32a-33a), and he sought review in the Federal Circuit.

[4] In order to continue to receive his disability annuity, respondent was required to earn less than $19,016.74 (80 percent of the base salary ($23,771) for a WG-10, Step 4 welder as of December 31, 1986). Pet. App. 21a.

[5] We have been informed by the Office of Personnel Management that the total amount of disability annuity withheld from respondent during the six months he was ineligible to receive it was $3,993.00.

4. A divided panel of the Federal Circuit reversed. It acknowledged as a "long-established rule" the traditional reluctance of courts to apply estoppel against the government. But in its view, this Court's decision in *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984), indicated that the government may be estopped upon a finding that the traditional elements of estoppel are present and that the government has engaged in "affirmative misconduct." Pet. App. 4a-10a. Applying this approach, the court first found the traditional elements of estoppel: it concluded that the government knew the facts; that the government gave misinformation to respondent with the intent that he rely on it; and that the respondent, in good faith, did reasonably rely on it to his detriment. Pet. App. 9a. Second, the court ruled that the government had engaged in "affirmative misconduct" sufficient to estop it from applying Section 8337(d) to deny respondent his annuity (Pet. App. 9a-10a):

> [W]e conclude that the government's action in providing [respondent] with an OPM letter which summarized a law which had been changed some 4 years earlier is sufficient "misconduct" for estoppel to apply. To provide such a letter to an individual who apparently made specific requests for current written information through what appeared to be the correct channels is reckless, at the very least. That it was "affirmative" conduct cannot be disputed.

The court then rejected the argument that the estoppel could not be used to award benefits to one ineligible for them, holding that where an individual would have been eligible "but for" the conduct of the government, it is "no bar" to an estoppel "[t]hat a statutory requirement is thereby effectively nullified." Pet. App. 13a. The court concluded that estoppel was warranted in this case.

Judge Mayer dissented. "This decision," he wrote, "contravenes the express mandate of Congress in 5 U.S.C. 8337(d) (Supp. 1988) and Supreme Court precedent." Pet. App. 15a. In his view, the case was controlled by this Court's decisions in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), and *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984), because the government agents' negligence here was no worse than in those cases. Pet. App. 15a-18a. In addition, the dissent found estoppel inappropriate because respondent had suffered no "irreparable injury" but rather had demonstrated that his earning capacity was, in fact, "restored." Pet. App. 17a, 19a. Judge Mayer concluded that, while this Court may have left open the question whether the government might be estopped upon a showing of "at least some form of egregious misconduct," "[o]urs is not that kind of case." Pet. App. 18a.

SUMMARY OF ARGUMENT

1. From its earliest days, this Court has consistently held that the government may not be estopped from enforcing the public laws. See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947). This case fits easily within that precedent; the erroneous decision by the court of appeals makes clear, however, the need for this Court to confirm the "no estoppel" rule. That rule is directed both by principles basic to our system of government and by practical considerations affecting the public interest.

a. The government cannot be estopped from enforcing the law because Congress has not waived the sovereign immunity of the United States to the assertion of such a claim. The government has never been subject to estoppel, nor have equitable doctrines ever supplied courts with authority to contravene written and applicable law.

Acting against this legal background, Congress has enacted no law granting courts a general authority to apply estoppel against the government. Nor has Congress consented specifically to the application of estoppel in suits

under 5 U.S.C. 8337 (1988). To the contrary, Congress has limited judicial review of agency action to the issue whether that action is "arbitrary, capricious, an abuse of discretion, or *otherwise* not in accordance with law." 5 U.S.C. 7703(a)(1) and (c) (1988) (emphasis added).

In addition, under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, Congress has specifically excluded recovery of money daamges for tort claims of negligent misrepresentation. Estoppel claims based on misrepresentations of government officials operate in large part as a device to obtain specific relief—often specific monetary relief—for injury occasioned by the same conduct. It is implausible to conclude that Congress, having carefully excluded liability for the tort of misrepresentation, has at the same time exposed the government to substantially the same liability by consenting to the application of estoppel.

b. Estoppel cannot be applied against the government for a further reason: to require that misrepresentations of Executive Branch officials be given the force of law, overriding statutory provisions enacted by Congress, would contravene basic principles of separation of powers. Whatever the nature of the misrepresentation claimed to have caused injury, the remedy sought—implementation of terms that contradict those fashioned by Congress—is beyond the authority of the Executive Branch to execute the law.

For the same reason, it lies beyond the judiciary's authority to order an estoppel. To give the force of law to a misrepresentation of a statute's requirements, a court must read into that statute a "misrepresentation exception"—that the statute will not apply when a party has relied to his or her detriment on a government employee's misinformation concerning the statute's terms. Such a reading arrogates Congress's authority to provide only those exceptions it deems appropriate.

Nor do principles of equity vest courts with general power to override congressional commands. To the contrary, courts of equity " 'can no more disregard statutory * * * requirements and provisions than can courts of law.' " *INS* v. *Pangilinan*, 108 S. Ct. 2210, 2216 (1988).

Separation of powers principles compel the conclusion that only Congress, consistent with the Presentation Clause, can decide when it is appropriate to provide a remedy for misrepresentation by a government official. In fact, Congress has historically performed precisely that task through private legislation. On a number of occasions, Congress has determined to transfer to the courts authority to deal with certain matters formerly dealt with through such legislation. Until and unless Congress confers such authority over claims of estoppel against the government, the courts may not properly entertain them.

c. To estop the government from enforcing the laws would disserve the public interest. A decision to impute the force of law to the words of millions of employees would burden the government with uncontrolled and potentially huge liability. It would fuel litigation characterized by problems of proof, would invite fraud or collusion by government officials, and could result in undesirable restrictions on the amount of information available to the public.

2. The presence of "affirmative misconduct" in making a misrepresentation does not affect the analysis. It does not change the fact that the United States has not consented to the application of estoppel against it, or that it is beyond the authority of the courts to order, and the Executive to implement, noncompliance with the law. Nor does the presence of "affirmative misconduct" bear any necessary correlation to the extent of the individual's injury, or mitigate the harm done to the public interest when the law is not enforced.

Rather, as this Court's cases show, recognition of detrimental reliance is warranted only when, as a result of

official misconduct, subsequent enforcement of a statute is rendered either unconstitutional or unwarranted on the statute's own terms. The question, then, ceases to be one of "estopping" the government from enforcing the law—since the law in such a case either requires that the statute be overridden or directs that the statute not be applied—but rather is one of applying the underlying substantive law. As the issue of estoppel disappears, so too do the sovereign immunity and separation of powers problems that attend it.

Negligent conduct such as that in this case therefore does not warrant the relief awarded by the court below. The negligent actions of government officials do not, in themselves, rise to the level of due process violations. *Daniels* v. *Williams*, 474 U.S. 327 (1986). Nor does this case present any constitutional or statutory problem of fair notice. Citizens are presumed to know the law, and cannot rely on the words of government officials to the contrary. *Merrill*, 332 U.S. at 384-385.

3. Even if this Court determines that the government can be estopped under some standard of affirmative misconduct, no estoppel is warranted here.

Respondent has not made the threshold demonstration that the traditional requirements of estoppel have been met. *Heckler* v. *Community Health Services*, 467 U.S. 51, 59 (1984). Since respondent is charged with knowledge of the law, he could not reasonably rely on the misinformation he was given at the Navy personnel office.

In any case, the conduct of the government employees here was no worse than misconduct that this Court has previously found insufficient to estop the government. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

ARGUMENT

I. THE GOVERNMENT CANNOT BE ESTOPPED FROM ENFORCING THE LAW BY THE MISREPRESENTATIONS OF EXECUTIVE BRANCH OFFICIALS

This Court has repeatedly held that the federal government cannot be equitably estopped from enforcing the public laws. See, *e.g.*, *Filor* v. *United States*, 76 U.S. (9 Wall.) 45, 49 (1869); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *United States* v. *San Francisco*, 310 U.S. 16, 32 (1940); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947); *INS* v. *Miranda*, 459 U.S. 14 (1982); *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984).[8] Indeed, to our knowledge the Court has never held the government estopped, whether the party seeking an estoppel has relied on a misrepresentation of fact (*Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813)), or of law (*Community Health Services*, *supra*); an oral misrepresentation (*Utah* v. *United States*, 284 U.S. 534 (1932), or a written one (*United States* v. *Stewart*, 311 U.S. 60 (1940)); an offhand remark by a federal employee (*Montana* v. *Kennedy*, 366 U.S. 308 (1961)), or a course of conduct by a federal agency or department (*INS* v. *Hibi*, 414 U.S. 5, 8 (1973)).

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[8] See also *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366, 369-370 (1813); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 680-681 (1868); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1868); *Whiteside* v. *United States*, 93 U.S. 247, 258 (1876); *Hawkins* v. *United States*, 96 U.S. 689, 696-698 (1877); *Wisconsin Central R.R.* v. *United States*, 164 U.S. 190, 210-212 (1896); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber Nat'l Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

These decisions establish, at the very least, that the government cannot be estopped from enforcing the law simply because a government official negligently gives out misinformation about that law—precisely the case here. Indeed, this case is virtually indistinguishable from *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), in which a government official incorrectly informed a claimant that she was ineligible for benefits, and failed to advise her to file a written application. In that case, the Court found nothing in the behavior of the government employee that could raise even a "serious question" whether the government could be estopped from enforcing the law. *Id.* at 790.

Thus, this case—like *Hansen* and the others in which lower court decisions have been reversed—fits squarely within settled precedent. But because the lower courts have misapplied that precedent, we believe it is important to underscore the bases of the principle that, despite hardship in individual cases, the government cannot be "bound [or] estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.*, 243 U.S. at 409. That precept is, we submit, mandated both by the doctrine of sovereign immunity and by principles of separation of powers. In addition, it is grounded in a sound calculus of the public interest: the citizenry is not well served if its government can be controlled and its treasury raided as a result of the random errors of misinformed employees and officials.

A. Congress has not consented to the application of estoppel against the government

1. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued.'" *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). As a relinquishment of sovereign immunity, congressional consent to be sued cannot be implied but must

be "unequivocally expressed." *Ibid.*; *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981).

A "necessary corollary" of the rule that the United States cannot be sued without congressional consent is that the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto * * * not * * * implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957); *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983).[7] The terms of Congress's consent define the extent of the courts' jurisdiction to entertain the suit. *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). "[A]ffirmative statutory authority * * * alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940).

2. The necessity of congressional consent to any application of estoppel against the government is underscored by two factors—the general "no estoppel" premise underlying congressional legislation and the nature of estoppel itself.

a. The rule that the government cannot be estopped or similarly bound by the actions of its agents was established in the earliest days of the Republic and has repeatedly been confirmed. See generally, p. 11, *supra*; see, *e.g.*, *Utah Power & Light Co.*, 243 U.S. at 409.[8] As

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[7] See, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156, 160-165 & n.9 (1981) (no right to jury trial inferred from waiver of sovereign immunity where such right does not traditionally apply in actions against the federal government).

[8] Closely related to the rule that the government may not be estopped is the doctrine that laches or neglect of duty by government officials is not a defense to a suit by the government. *Utah Power & Light*, 243 U.S. at 409. That rule was so firmly established by 1821 that Justice Story found the broad language of Section 34 of the Judiciary Act of 1789, ch. 20, 1 Stat. 92, insuffi-

this Court put it in *Merrill*, "the rules of law whereby private [actors] * * * are rendered liable for the acts of their agents are not bodily applicable to a Government agency * * *, unless Congress has so provided." 332 U.S. at 383 n.1.

The premise that the government cannot be estopped from enforcing public law is reinforced by the "well-established" principle that courts of equity can " 'no more disregard statutory and constitutional requirements and provisions than can courts of law.' " *INS* v. *Pangilinan*, 108 S. Ct. at 2216 (quoting *Hedges* v. *Dixon County*, 150 U.S. 182, 192) (1893)); accord 2 J. Pomeroy, *Pomeroy's Equity Jurisprudence* § 425, at 189 (S. Symons 5th ed. 1941); see generally pp. 26-28, *infra*. Since it is "always appropriate to assume that our elected representatives, like other citizens, know the law" (*Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979), Congress must be assumed to be aware of a doctrine that is both long established and basic to the role of government in enforcing written law.

b. The nature of the estoppel doctrine dictates special care in construing the conditions of any consent by Congress to suit. Courts have noted Sir Frederick Pollock's description of the doctrine as "a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence." *Canada and Dominion Sugar Co., Ld.* v.

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cient to waive the immunity of the United States to the binding effect of local statutes of limitations. Section 34 declared:

> [T]hat the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.

United States v. *Hoar*, 26 F. Cas. 329, 329-330 (C.C.D. Mass. 1821) (No. 15,373). See also, *e.g.*, *Dox* v. *Postmaster General of the United States*, 26 U.S. (1 Pet.) 318, 323-326 (1828) (Marshall, C.J.); *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735-737 (1824) (Story, J.).

Canadian Nat. (West Indies) Steamships, Ld., [1947] App. Cas. 46, 55 (H.L. (Can.) 1946). Its "unusual remedial approach" is to protect reliance on a misrepresentation by treating the misrepresentation as true. Shimomura, *Federal Misrepresentation: Protecting the Reliance Interest*, 60 Tulane L. Rev. 596, 613 (1986) [hereinafter *Misrepresentation*]; see generally 3 J. Pomeroy, *supra*, § 813. Given the power, flexibility, and unusual character of the remedy, the burden of establishing that its application is warranted rests with the person who seeks it. See *Community Health Services*, 467 U.S. at 61.[9]

If allowed to operate against the government, the remedy of estoppel would prohibit it from enforcing compliance with law. Estopping the government, like imputing laches to its officers or holding it to local statutes of limitations, thus endangers " 'the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers.' " *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938) (quoting *United States* v. *Hoar*, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373)). As this Court noted in *Community Health Services*, "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." 467 U.S. at 60; see also *Utah Power & Light Co.*, 243 U.S. at 409.

3. a. In light of these considerations, Congress's failure to give general consent to a waiver of the requirements of its laws, as a free-floating remedy for government mis-

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[9] In particular, a party claiming estoppel must show both that it relied on a misrepresentation by an adversary so "as to change [its] position for the worse," and that the reliance so induced was "reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Heckler* v. *Community Health Services*, 467 U.S. 51, 59 (1984); see generally 3 J. Pomeroy, *Pomeroy's Equity Jurisprudence* § 805 (S. Symons ed. 1941).

conduct, is all the more notable. Cf. *Pangilinan*, 108 S. Ct. at 2216.

Certainly, the provisions waiving immunity and establishing the standards of judicial review in this case, 5 U.S.C. 7703(a)(1) and (c) (1988) (see *Lindahl* v. *OPM*, 470 U.S. 768, 793 (1985)), do not so deputize the courts. Section 7703(c)(1) authorizes courts to "hold unlawful and set aside any agency action, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or *otherwise* not in accordance with law" (emphasis added). It cannot be "arbitrary," "capricious," or "an abuse of discretion" to require all individuals equally to meet statutory requirements as written. See *Automobile Club*, 353 U.S. at 185-186 (no abuse of discretion when Commissioner retroactively revoked erroneous tax exemption ruling and applied revocation to all); *Dixon* v. *United States*, 381 U.S. 68, 73-76 (1965) (similar). This is especially true in light of the general policy that knowledge of public law is presumed. *Merrill*, 332 U.S. at 384-385; *Community Health Services*, 467 U.S. at 63.

Nor does the balance of Section 7703(c)(1) provide support for the availability of a remedy such as equitable estoppel. Rather, that provision restricts the scope of judicial review to agency actions, findings, and conclusions which, if not arbitrary, capricious, or an abuse of discretion, are "*otherwise* not in accordance with law" (emphasis added). Short of an explicit denial of authority to estop the government, it is difficult to conceive a waiver of sovereign immunity less hospitable to interpretation as broad consent to so "powerful and flexible [an] instrument" as estoppel.[10]

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[10] Congress clearly knows how to consent to a broader application of remedies. Compare Indian Claims Commission Act, 25 U.S.C. 70a (1976); *United States* v. *Mitchell*, 445 U.S. 535, 540 n.2 (1980) (Section 70a waived sovereign immunity of United States as to claims by Indian parties based on considerations of "fair and honorable dealings that are not recognized by any existing rule of law or equity").

b. The conclusion that Congress has not conferred general authority upon the courts to estop the government is reinforced by the specific exclusion of all negligent misrepresentation claims from the scope of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* The FTCA provides that an individual may recover damages from the sovereign for a tort committed by one of its agents. A party seeking to estop the government is, in essence, seeking to obtain a remedy from the sovereign for a tort--misrepresentation—by one of its agents. In fact, the effective operation of estoppel as a remedy for tortious conduct was recognized by one of this country's early authorities on estoppel. See J. Ewart, *An Exposition of the Principles of Estoppel by Misrepresentation* 190-191 (1900) (noting operation of estoppel as "thinly veiled action in deceit"). And the "traditional and commonly understood" legal definition of the tort of "negligent misrepresentation" identified by this Court underscores the similarity: negligent misrepresentation by the government occurs when a party is injured by the "breach of a 'specific duty' owed by the Government to him, *i.e.*, the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs." *United States* v. *Neustadt*, 366 U.S. 696, 706 (1961). See also *Misrepresentation*, at 613-614.

Estoppel differs from a tort claim in that it assumes the existence of the tort by the employee and seeks not damages but specific relief—in this case, respondent's enrollment in the disability annuity plan available under 5 U.S.C. 8337.[11] But it does not follow that,

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[11] Here, the court of appeals remanded the case "to the board with instructions to direct the agency to issue the withheld disability benefits to Mr. Richmond." Pet. App. 14a. There can be little doubt that this order grants specific relief. See *Bowen* v. *Massachusetts*, 108 S. Ct. 2722, 2731-2736 (1988); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)

simply because the government *concedes* the tort of one of its employees, a court has authority to grant a different type of remedy. To the contrary, this Court has recognized that waivers of immunity from damage suits may raise sovereign immunity concerns far less intense than waivers of immunity from suits for specific relief. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703-704 (1949).[12]

Since a claim of estoppel is essentially the same, in purpose and effect, as a claim in tort,[13] it is significant that Congress has specifically excluded tort damages for misrepresentation, whether negligent or intentional, from the scope of the FTCA. 28 U.S.C. 2680(h) (1982); *United States* v. *Neustadt*, 366 U.S. 696 (1961). Moreover, the legislative history of that Act indicates that the purpose of the exclusion was to avoid precisely the risks of uncontrolled liability that a policy of estopping the government would raise.[14] Congress's evident concern not to

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(specific relief includes "the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant['s] * * * actions").

[12] For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.

Larson, 337 U.S. at 704.

[13] See, *e.g.*, *Reamer* v. *United States*, 459 F.2d 709 (4th Cir. 1972) (asserting tort, implied contract, and estoppel claims for misrepresentation by government agent).

[14] In the record of the hearings on an earlier version of the FTCA, a Justice Department statement explains Section 2680(h) as "except[ing] from the scope of the act a series of torts as to which, for the time being at least, it may be dangerous for the

expose the government to tort liability for the misrepresentations of its agents makes it even less plausible that Congress has impliedly authorized relief for the same injury via another route, that of estoppel.[15] It is not for the judiciary to second-guess Congress's determination that the protection of sovereign immunity is necessary. *Larson*, 337 U.S. at 705.[16]

Government to subject itself to suit, until in any event considerable experience has been had under the proposed legislation." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 13 (1940). As a representative of the Department testified, "[The provision] proposes to exclude from the cognizance of the law claims arising out of * * * a type of torts which would be difficult to make a defense against, and which are easily exaggranted." *Id.* at 39; see also *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 891 n.448 (1957); Comment, *The Federal Tort Claims Act*, 56 Yale L. J. 534, 547 (1947).

[15] By precluding recovery for the tort of misrepresentation, Congress has shut off a major source of potential liability. Another major source of uncontrolled liability for misrepresentation has been disposed of by the rule that only those with actual authority can bind the government in contract (*i.e.*, that unauthorized statements or conduct cannot "estop" the government from asserting its rights under a contract). See, *e.g.*, *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902). The requirement of authorized action ensures that all contract claims against the government can be resolved by recourse to principles of contract law alone: the government, like other parties, is bound by the words of its authorized contracting officers. See *Larson*, 337 U.S. at 701 n.24; see C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3657, at 291-293 (1985 & Supp. 1989) (noting rationale that implied-in-law contract claims are outside of Claims Court's jurisdiction as breaches of sovereign immunity); see, *e.g.*, *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122, 129 (1868). The rule that unauthorized conduct cannot contractually bind or "estop" the government—a rule long established by this Court (see note 17, *supra*)—is now confirmed by regulation. See 48 C.F.R. 1.601 (1988).

[16] Nor can an "estoppel" argument be framed by asserting that blameworthy conduct by government officials bars the United States

B. To estop the government from enforcing the laws would violate constitutional principles of separation of powers

1. The practical effect of estopping the government by treating as true the misrepresentations of its agents is to give the words of Executive Branch officials the force of law, even though they are in direct conflict with statutory terms enacted by Congress. Estoppel of the government thus confers *pro tanto* legislative status on government employees, and effectively overrides Congress's mandates. See *Merrill*, 332 U.S. at 383. That result is contrary to the principle—basic to our tripartite system of government—that only Congress may exercise legislative power. *Dixon*, 381 U.S. at 73, 74-75; cf. *Mistretta* v. *United States*, 109 S. Ct. 647, 661-664 (1989). See, *e.g.*, *Automobile Club*, 353 U.S. at 187 (erroneous revenue ruling does not bar collection of taxes mandated by statute); *San Francisco*, 310 U.S. at 31-32 (no estoppel on basis of erroneous administrative interpretation of statute); *Snyder* v. *Buck*, 340 U.S. 15, 19 & n.6 (1950) (no estoppel or alteration by agreement of statutory directives concerning substitution of parties in suit); *Wisconsin Central R.R.* v. *United States*, 164 U.S. 190, 205-210 (1896) (order of Postmaster General in derogation of statute is not bar to recouping overpayments); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 674-682 (1868) (no authority may be exercised by Secretary of War except that delegated by express statutory law or by Constitution).[17]

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from interposing the defense of sovereign immunity: since congressional consent to be sued defines the terms of the courts' jurisdiction, immunity cannot be "waived" by government officials. See, *e.g.*, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940); *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939).

[17] The same principle—that the Executive can act only to implement the law and not to change it—underlies the long-established proposition that the United States cannot be bound in contract by agents acting without actual authority. See, *e.g.*, *Sutton*, 256 U.S. at 578-581; *Pine River Logging Co.*, 186 U.S. at 290-291; *Whiteside*, 93 U.S. at 250, 256-257; *Filor*, 76 U.S. (9 Wall.) at 48; *The Floyd Acceptances*, 74 U.S. (7 Wall.) at 675-683.

As this Court has explained, in a system of government "in which all power is delegated, and is defined by law, constitutional or statutory," the authority of government officers must be found in "one or both of these sources * * * in every instance." *The Floyd Acceptances*, 74 U.S. (7 Wall.) at 676. It cannot otherwise be created, either by usage or by case law. *Id.* at 677-679; see also *Sutton*, 256 U.S. at 579-581.

a. The doctrine applies with special force in cases like this, where the result is to require expenditure of public funds contrary to express congressional mandate. Under the Appropriations Clause,[18] only Congress is vested with power to allocate public monies. "No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them. * * * However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not * * * previously sanctioned [under an appropriation by Congress]." *Reeside* v. *Walker*, 52 U.S. (11 How.) 271, 291 (1850). To impose an estoppel would violate that rule. "[F]unds contributed by all citizens, with definite limitations upon their use," cannot be turned over to a person not within those limitations "simply because the Federal Government has not been able to secure perfect performance from its hundreds of thousands of employees scattered throughout the continent."[19] *Hansen* v. *Harris*, 619 F.2d 942, 954 (2d

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[18] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, Cl. 7.

[19] The government currently employs 3,176,111 civilians; as of 1988, it also employed, 2,247,000 military personnel. See *Federal Civilian Workforce Statistics: Employment and Trends as of July, 1989*, at 6 (OPM 1989); *Statistical Abstracts of the United States* 335 (U.S. Dep't of Commerce 1989).

Cir. 1980) (Friendly, J., dissenting), rev'd *sub nom. Schweiker* v. *Hansen*, 450 U.S. 785 (1981); see *Community Health Services*, 467 U.S. at 63.

That conclusion is especially warranted here. Congress amended Section 8337(d) as part of legislation aimed at reducing federal expenditures. Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 302(a)(1) and (2), 96 Stat. 792; see S. Rep. No. 504, 97th Cong., 2d Sess. 3 (1982). The Senate committee explained the new one-year test for earning capacity in Section 8337(d) as follows:

> Because of the two consecutive year provisions [in the existing earning capacity test], some annuitants can and have manipulated their salary to exceed the 80% level one year and fall below that level the next year. The proposed change to a one year test will make manipulation more difficult, while protecting the interests of disability annuitants who are able to work for short periods or who derive windfall earnings over the short term, but are unable to pursue sustained employment.

S. Rep. No. 504, *supra*, at 228.

The effect of the Federal Circuit's order in this case is thus to require a direct violation of "the conditions defined by Congress for charging the public treasury." *Merrill*, 332 U.S. at 385.

b. The separation of powers concerns posed by estoppel arise not from the specifics of a claimant's injury but from the nature of the remedy sought—an order that the Executive act in violation of the law. Thus, the form of the original misrepresentation is irrelevant. It does not matter whether the misconduct consists of a course of conduct by an agency (see, *e.g.*, *Hibi*, *supra*; *Dixon*, *supra*) or a single default by a government employee (see *Hansen*, *supra*). Nor, as the courts have recognized, does the fact that a misrepresentation occurs in writing affect the analysis. See, *e.g.*, *Automobile Club*, 353 U.S. at 183-184 (no estoppel preventing enforcement

of corrected administrative rulings despite earlier rulings to contrary); *Stewart*, 311 U.S. at 61, 70 (no estoppel despite reasonable reliance on statements contained in circulars and bulletins issued by the Farm Loan Board).[20]

Similarly, it does not matter whether the misrepresentation affects "substantive" or "procedural" requirements (*Hansen*, 450 U.S. at 790), or whether the misrepresentation occurs while an agency is engaged in a business formerly conducted by or in competition with private ventures (*Merrill*, 332 U.S. at 383-384). In each case, the estoppel order requires the Executive to act inconsistently with its obligation to execute the law. The errors of its officials are thus compounded, not resolved, by a judicial requirement that a congressional mandate be further violated.

2. Separation of powers principles are violated not only by the execution of an estoppel but by the action of the courts in ordering it.

a. A court that estops the government from applying a statute in accordance with its terms effectively rewrites that statute to include a "misrepresentation exception." In this case, for example, the Federal Circuit has rewritten Section 8337(d) to add the italicized phrase:

> Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement *unless the annuitant is informed otherwise by a government official or agency and relies to his detriment on such advice.*

This action contravenes basic principles of statutory construction that ensure that Congress alone will legis-

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[20] See also *United States* v. *Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Seime* v. *Bowen*, 822 F.2d 7 (2d Cir. 1987); *Crowe* v. *United States Railroad Retirement Board*, 811 F.2d 1017 (7th Cir. 1987); *Dorl* v. *Commissioner*, 507 F.2d 406 (2d Cir. 1974). Cf. *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813) (government not bound by unauthorized promise of conveyance of land recorded by city commissioners in journal).

late. In fact, Congress recognizes that hardships may be caused by official mistakes or misrepresentations. It knows how to protect individuals who rely to their detriment on such conduct, and on those occasions when it deems such protection necessary, it has written the appropriate "misrepresentation exceptions" into law.

Thus, Congress has specifically identified situations in which it intends good-faith reliance on administrative rules, regulations, interpretations, or similar action to constitute a defense to government enforcement in a judicial or administrative proceeding. See, *e.g.*, 2 U.S.C. 437f(c) and 438(e) (1988) (Federal Election Campaign Act); 15 U.S.C. 57b-4 (1988) (Federal Trade Commission Act); 15 U.S.C. 77s(a) (1982) (Securities Act of 1933); 29 U.S.C. 258-260 (1982) (Portal-to-Portal Act); 29 U.S.C. 1028 (1982) (Employee Retirement Income Security Act); 42 U.S.C. 2000e-12 (1982) (Civil Rights Act of 1964, Tit. VII); 42 U.S.C. 7193(g) (1982) (Department of Energy Organization Act); Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 8018, 102 Stat. 3794.[21]

In other cases, Congress has made provision for circumstances that chronically put individuals at risk of

[21] For example, the Portal-to-Portal Act provides:

> [N]o employer shall be subject to any liability or punishment [for violation of the relevant acts] * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [relevant] agency of the United States * * * or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

29 U.S.C. 259 (1982).

detrimental reliance. For one thing, it has barred government recoupment of overpayments in various situations, if such recoupment would be "against equity and good conscience." See, *e.g.*, 5 U.S.C. 8346(b) (1988) (Civil Service retirement); 38 U.S.C. 3102(a) (1982) (veterans' benefits); 42 U.S.C. 404(b) (1982) (old age, survivors', and disability insurance benefits); 42 U.S.C. 1395gg(c) (1982) (Medicare service payments); 45 U.S.C. 231i(c) (1982) (payments under Railroad Retirement Act of 1974); 45 U.S.C. 352(d) (1982) (Railroad Unemployment Insurance benefits); cf. 42 U.S.C. 1383(b)(1)(B) (Supp. V 1987) (Supplementary Security Income).[22] Calibrating the circumstances, Congress has enacted a number of other, permissively phrased overpayment provisions, conferring discretion on the agency to waive recoupment when "equity and good conscience" so indicate.[23] A very different example is Congress's provision for remission of customs forfeitures given "mitigating circumstances" and on such terms as the administrator deems "reasonable and just." 19 U.S.C. 1618 (1982). By regulation, "mitigating factors" include a "contribu-

[22] Regulations issued pursuant to delegated authority may further specify that agency misconduct or fault, as well as detrimental reliance by an individual on the overpayment, are circumstances that warrant waiver of recoupment as "against equity and good conscience." See, *e.g.*, 5 C.F.R. 831.1402(b) and 5 C.F.R. 831.1403(a)(2) (1988) (Civil Service retirement overpayments); 20 C.F.R. 404.509-404.510 (1988) (old age, survivors', and disability insurance benefits); 38 C.F.R. 1.965(a)(2) and (4) (1988) (veterans' benefits).

The Executive Branch may on its own initiative provide for flexibility in the administrative of its regulations. For example, it may extend filing periods where an employee has not received notice of time requirements. See, *e.g.*, 29 C.F.R. 1613.214(a)(1) and (4) (1988).

[23] See, 5 U.S.C. 4108 (1988) (employee training expenses); 5 U.S.C. 5584 (1988) (employee travel and related expenses); 5 U.S.C. 5922(b)(2) (1988) (overseas cost allowances); 10 U.S.C. 1442, 1453 (1988) (military service retirement); 10 U.S.C. 2774(a) (1988) (military pay and travel expenses); 32 U.S.C. 716 (1982) (same, National Guard).

tory Customs error" such as incorrect advice from a Customs officer. 19 C.F.R. 171 App. A (1988).[24]

In short, Congress has on many occasions expressly recognized that governmental conduct may provoke detrimental reliance. When it regards the risks of such reliance as unacceptably high, Congress has specified the available remedies. Further and different remedies should not be presumed. See, *e.g.*, *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974).

b. Nor do principles of equity provide a court with power to "override a 'public policy established by Congress.'" *Pangilinan*, 108 S. Ct. at 2215. Courts of equity cannot disregard statutory and constitutional provisions. To the contrary, "[t]hey are bound by positive provisions of a statute equally with courts of law." 2 J. Pomeroy, *supra*, § 425, at 189; *Pangilinan*, 108 S. Ct. at 2216; p. 14, *supra*.[25] Thus, "[w]herever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules." 2 J. Pomeroy, *supra*, § 425, at 190. In this case, those rules consist of the

[24] See also, *e.g.*, 14 U.S.C. 513 (1988) (allowing Coast Guard retroactive pay and allowances if entitlement delayed in vesting because of administrative error).

Congress may also make allowance for specific instances of governmental mistake or misrepresentation that induce detrimental reliance. See, *e.g.*, *Heckler* v. *Mathews*, 465 U.S. 728 (1984); *United States* v. *Realty Co.*, 163 U.S. 427 (1896).

[25] This Court has recognized an analogous concept in the criminal law. In *Sorrells* v. *United States*, 287 U.S. 435, 449-450 (1932), the Court refused, as an arrogation of executive and legislative power, to regard a claim of entrapment as asserting a bar to the prosecution of, or a grant of immunity to, an otherwise guilty individual. The Court concluded instead that the terms of the statute itself reasonably could be read to include a defense of entrapment. That is, under the Court's approach, the issue remained one of whether the statute applied, not one of whether the Executive Branch should be estopped from enforcing an admittedly applicable statute. See also *United States* v. *Russell*, 411 U.S. 423, 428-429, 435 (1973).

entire scheme of compensation created and regulated by the Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*

Estoppel against the government thus poses a dilemma that seldom arises in private litigation. This Court recognized the difference in perhaps its earliest estoppel case when it said that it is one thing to bind an individual "who has himself an interest in the subject-matter of inquiry, who cannot well be mistaken, and whose conduct, therefore, ought to be conclusive on him" (*Lee*, 11 U.S. at 368) and quite another to bind the government to the representations of one of its agents, who, "entrusted with the sales of public lands, or empowered to make contracts for such sales, might, by inadvertence, or incautiously giving information to others, destroy the lien of his principals." *Id.* at 369.[26]

In short, a doctrine that developed as an imperfect but useful remedy in litigation against a private party (see *Misrepresentation*, at 612) is a manifestly ill-suited device when the defendant is a public party charged with enforcing public rights. Although claims of estoppel against the government regularly present the courts with "hard case[s]" that tempt them to resist the clear meaning of a statute or regulation (*Merrill*, 332 U.S. at 386), nothing changes the judicial obligation faithfully to ob-

[26] On occasion, similar dilemmas arise even between private parties. The classic example is that of the warehouseman who certifies to a potential purchaser that he holds the goods for the seller, when in fact he holds them for another. On that authority, the purchaser buys the goods; the warehouseman is estopped from denying that he holds the purchaser's goods, even as he cannot deny that they belong to the true owner. J. Ewart, *An Exposition of the Principles of Estoppel by Misrepresentation* 190 (1900). As Ewart concludes, "[p]lainly [the warehouseman] cannot give them to both; and just as plainly, no court will wittingly order him to do so." In particular, no court will order "specific delivery of goods [to the purchaser] which do not belong to him." *Ibid.* The solution, one unavailable against the government because of the FTCA's misrepresentation exception, is a damage award. *Ibid.*

serve the conditions set by law.[27] "'A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law.'" *Pangilinan*, 108 S. Ct. at 2216.

3. Separation of powers principles compel the conclusion that, unless Congress chooses to delegate such authority to another branch, only it can 'estop the government' from properly implementing statutory terms. In fact, history confirms the structural deduction: Congress has assumed and exercised precisely such authority since its inception. When the government incurs debts of a "moral, equitable or honorable" nature (*United States* v. *Realty Co.*, 163 U.S. 427, 437 (1896)) that are unenforceable in the courts, Congress has used its power to enact private legislation to remedy such injuries. As the Court explained in *Realty*:

> The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. * * * To no other branch of the government than Congress could any application be succesfully made on the part of the owners of such claims or debts for the payment thereof.

Realty, 163 U.S. at 440-441.[28]

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[27] It is likewise clear that a court may not estop the operation of a valid regulation. Congress may either define necessary statutory conditions itself, or it may "legislate[,] * * * as in modern regulatory enactments it so often does, by conferring the rule-making power upon the agency created for carrying out its policy." *Merrill*, 332 U.S. at 384-385. In either case, the resulting rule is an expression of Congress's will. See, *e.g.*, *Community Health Services*, 467 U.S. at 65-66; *Hansen*, 450 U.S. at 790; cf. *Pine River Logging*, 186 U.S. at 291-292.

[28] *Realty* concerned a private bill passed by Congress to aid sugar manufacturers who had come to rely on "sugar bounties" provided by the federal government for the protection of the domestic sugar industry. After unexpectedly repealing the public law providing for such bounties, Congress provided compensation to those manufacturers who, in reliance on that public law, had committed their resources for the year on the assumption of receiving the bounties. (The issue in *Realty* therefore concerned purely a gratuity; the parties did not attempt an estoppel argument. 163 U.S. at 440.)

a. From its inception, Congress has awarded equitable relief by enacting private bills. *Realty*, 163 U.S. at 141. Originally, Congress exercised general control over contract, tort, takings, and other claims against the United States. See Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 625, 637-648 (1985) [hereinafter *History of Claims*]; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 552-558 (1962). By its passage of the Tucker Act, the Federal Tort Claims Act, and various narrower measures, Congress has vested the courts over the years with authority to decide many of these claims. See generally *History of Claims*, *supra*; pp. 33-34, *infra*. But Congress retained its control over claims against the United States that are "founded upon equitable and moral considerations and grounded upon principles of right and justice" (*Realty*, 163 U.S. at 444) and that remained unenforceable in the courts. *History of Claims*, at 653, 664-666, 682, 699 & n.606.

This Court has recognized that Congress's authority over "equitable and moral" claims embraces claims of estoppel. Clarifying the jurisdiction of the newly created Court of Claims in the 1860s, the Court repeatedly rejected estoppel or implied contract arguments (based on the unauthorized acts of government officers), dismissed the cases, and advised the litigants that "[i]f the petitioners are entitled to compensation * * * they must seek it from Congress. The Court of Claims can award them none." *Filor*, 76 U.S. (9 Wall.) at 49; see also *Hawkins* v. *United States*, 96 U.S. 689, 698 (1877); *Gibbons* v.

United States, 75 U.S. (8 Wall.) 269, 275-276 (1868). The claimants in those cases did indeed seek relief in Congress,[29] and other litigants who failed to persuade this Court to estop the government have recognized the remedy on their own initiative.[30]

In 1966, Congress confirmed the importance of its private lawmaking function. Enacting legislation to update its congressional reference authority,[31] Congress noted

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[29] See S. Rep. No. 189, 49th Cong., 1st Sess. 3 (1886) (denying recovery to Filor and his associates as "collusive grantees" of property transferred to them by "a Confederate and an enemy"); Act of Mar. 2, 1881, ch. 113, 21 Stat. 636; S. Rep. No. 854, 46th Cong., 3d Sess. (1881); and H.R. Rep. No. 886, 46th Cong., 2d Sess. 2 (1880) (granting relief to Hawkins because "the officers of the United States were in fault in this matter"); H.R. Rep. No. 673, 43d Cong., 1st Sess. (1874) (denying relief to Gibbons because no duress, no recovery possible for tort charged).

[30] Compare *Wilber Nat'l Bank*, *supra* (no remedy for lapse of insurance coverage despite lack of notice from government), with H.R. 8220, 74th Cong., 1st Sess. (1936) (granting relief), vetoed by President (80 Cong. Rec. 10,560 (1936)); subsequent bill, favorably reported from House, not reported from Senate, see H.R. Rep. No. 34, 76th Cong., 1st Sess. 4 (1939) (noting that, despite Court's conclusion that knowledge of law must be imputed, the "insured did everything in his power to procure, carry, and maintain" his government insurance) (quoting H.R. Rep. No. 1435, 74th Cong., 1st Sess. (1935)).

Compare *Sutton* v. *United States*, 256 U.S. 575, 579 (1921) (no remedy for cost overrun in government contract due to errors by government inspector), with Priv. L. No. 213, ch. 195, 42 Stat. 1784 (1923) (granting relief); see H.R. Rep. No. 1376, 67th Cong., 4th Sess. (1923); and S. Rep. No. 887, 67th Cong., 2d Sess. 1 (1922) ("although legally the contractor was charged with knowledge of the extent of the funds available, * * * the lack of information that the appropriation had been exhausted was entirely excusable"); H.R. Doc. No. 348, 67th Cong., 2d Sess. (1922) (Communication from the President).

[31] The congressional reference authority is designed to facilitate congressional action on private legislation. S. Rep. No. 1643, 89th Cong., 2d Sess. 4-5 (1966). Under that authority, Congress refers proposed legislation to the United States Claims Court for fact-finding sufficient to inform Congress whether the demand is a

that government officials have less flexibility to waive the government's rights under a general statute than private parties have to forgo amounts legally due them, and also observed that courts "have less freedom to adjust their decisions to the equities of particular situations than they do in developing" common law relations between private parties. S. Rep. No. 1643, 89th Cong., 2d Sess. 4-5 (1966). Congress therefore continues to identify a role for private legislation where there is a "need for an equitable exception to the general law, and claims which an agency is simply not authorized to adjust or will not for policy reasons. It is in this area that the sovereign has reserved its right to exercise its conscience with measures for special relief." Staff of House Comm. on the Judiciary, 90th Cong., 2d Sess., *Private Claims Acts and Congressional References* 12 (Comm. Print 1968) (M. Bennett) [hereinafter Bennett]. Under the criteria adopted by the House subcommittee that controls the processing of most private claims, "the subcommittee is guided by principles of equity and justice. [Its task] * * * is to determine whether the equities and circumstances of a case create a moral obligation on the part of the Government to extend relief to an individual." *Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 1st Sess., *Supplemental Rules of Procedure for Private Claims Bills* 2 (1989).[32]

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legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States." 28 U.S.C. 1492, 2509(c) (1982).

[32] A study conducted in 1966 determined that, aside from immigration bills, private legislation provided relief that fell into certain general categories, including waivers of the obligation to return government overpayments and waivers of various statutes of limitations. Note, *Private Bills in Congress*, 79 Harv. L. Rev. 1684, 1693-1697 (1966). In many categories, government fault was an important factor in the award of private relief. *Ibid.* See also Gellhorn & Lauer, *Congressional Settlement of Tort Claims*

b. Although it has chosen to restrict its consideration of certain types of claims,[33] Congress continues annually to pass bills granting private relief to those who have relied to their detriment on misrepresentations by government employees. For example, Congress in 1986 waived the statutory deadline under 5 U.S.C. 8337(d) in the case of a petitioner who failed timely to apply because he relied on erroneous information given him by a federal personnel officer. Priv. L. No. 99-3 (June 19, 1986), see 131 Cong. Rec. 9675 (1985) (remarks of Sen. Helms).[34]

Against the United States, 55 Colum. L. Rev. 1, 14 (1955); Glosser, *Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective*, 25 Am. U. L. Rev. 595, 617-623 (1976) (congressional reference case criteria). Commentators have noted that the procedures used by Congress are fair and quite reliably free from partisan influence. See Note, *Private Bills*, *supra*, at 1703; Gellhorn & Lauer, *supra*, at 4, 36.

[33] The House subcommittee states that it will not consider claims of eligibility under a number of acts when those claims have been considered "on [their] merits" (*Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 1st Sess., *Supplemental Rules of Procedure for Private Claims Bills* 5, 9 (1989) [hereinafter *Rules*] (the Longshore and Harbor Workers Compensation Act, the Federal Employee Compensation Act, the Railroad Retirement Act, and the Social Security Act)), although it will intervene to waive the statutes of limitations (Rules 8, 14, 15) for the latter three acts. The subcommittee generally declines to hear claims for Civil Service retirement benefits (Chapter 83 of Title 5), and analogous military benefits (Rule 9) because such action would "interfer[e] with the general provisions of such laws by conferring a special benefit or privilege on a claimant." *Rules*, at 7. Nonetheless, Congress continues to grant relief, construing exceptions to these categories as necessary (as the bills cited below indicate).

[34] For similar instances, see, *e.g.*, Priv. L. No. 100-37 (Nov. 9, 1988), and H.R. Rep. No. 291, 100th Cong., 1st Sess. (1987) (awarding interest lost as result of joining wrong retirement plan because of erroneous advice); Priv. L. No. 100-33 (Nov. 3, 1988), and H.R. Rep. No. 290, 100th Cong., 1st Sess. (1987) (waiving recoupment of overpayment that induced retirement); Priv. L. No. 100-25 (Oct. 28, 1988), and H.R. Rep. No. 148, 100th Cong., 1st Sess. (1987) (where lack of waiver based on erroneous advice, deeming military retirement pay to have been waived so that calculation of survivor annuity could include military service); Priv. L. No. 99-14 (Sept. 23, 1986), and H.R. Rep. No. 78, 99th Cong., 1st Sess. (1985) (same).

A number of bills appear to grant moving, travel, or other expenses incurred in reliance on erroneous official advice. See, *e.g.*, Priv. L. No. 100-47 (Nov. 10, 1988), and H.R. Rep. No. 443, 100th Cong., 1st Sess. (1987) (moving expenses); Priv. L. No. 100-26 (Oct. 28, 1988), and H.R. Rep. No. 545, 100th Cong., 2d Sess. (1988) (subsistence expenses).

Should Congress determine that its private bill mechanism is an insufficient response to the "estoppel" claims of citizens, it knows full well how to respond. Congress has repeatedly waived sovereign immunity and defined the terms of that waiver when it felt compelled by its workload or the nature of its task to refer certain categories of claims to the courts. Just such a purpose stimulated the creation of the former Court of Claims and the vesting of jurisdiction in that court to award final judgments (*Glidden*, 370 U.S. at 552-554; Bennett, *supra*, at 5; the passage of the Tucker Act, ch. 359, § 1, 24 Stat. 505, to expand the jurisdiction of the Court of Claims to hear contract, takings, and other claims (*Glidden*, 370 U.S. at 556-557; *History of Claims*, at 664-665); the enactment of the FTCA, ch. 753, 60 Stat. 842 (S. Rep. No. 1400, 79th Cong., 2d Sess. 7 (1946); *Dalehite* v. *United States*, 346 U.S. 15, 24-25 (1953)); the confirmation and refinement of the congressional reference authority (S. Rep. No. 1643, *supra*, at 4-5);[35] the passage of the Quiet Title Act, Pub. L. No. 92-562, 86 Stat. 1176,

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[35] Congress's retention of its reference authority has particular relevance, since the purpose of such references is to aid Congress in disposing of private legislation. As the Claims Court recently noted in response to a government objection that the court could not recommend relief to a contractor who had relied on unauthorized representations in a contract dispute, "[this] reasoning is nothing less than an expression of dissatisfaction by counsel with the Congressional Reference system itself." *Merchants Nat'l Bank* v. *United States*, 5 Cl. Ct. 180, 208 (1984). Rather, the court considered

in 1972 (*Block*, 461 U.S. at 280-281); and numerous other delegations, including nonjudicial devices, for dealing with its workload.[36]

We are not unmindful that private legislation is a "clumsy, time-consuming * * * procedure" (*INS* v. *Chadha*, 462 U.S. 919, 954 (1983)), and that Congress has chosen to limit its availability in practice (see note 33, *supra*). But whatever its infirmities, it remains the structural recourse for those wishing to estop the government from enforcing the law. Any arguments for change are "appropriately addressed to Congress" (*Dixon*, 381 U.S. at 80), not this Court.

C. The application of estoppel against the government would not be in the public interest

The "unusual remedial approach" of estoppel against the federal government would direct that, notwithstanding provisions of law to the contrary, the errors of individual officers be made controlling. Such a regime would undermine the ability of the Executive to fulfill its constitutional responsibility faithfully to execute the duties assigned it by Congress.

If estoppel were permitted, the government would be exposed to enormous potential liability. It is simply impossible for the federal government to exercise complete control over every one of its millions of employees and agents. Despite good-faith efforts to avoid mistakes, the

itself obligated to identify the "equitable" grounds that may exist for relief when "the Government would be legally liable *but for one or more extrameritorious defenses that accrue to it by virtue of its sovereign status.*" *Id.* at 209 n.29 (quoting *Burt* v. *United States*, 199 Ct. Cl. 897, 906 (1972)).

[36] Perhaps the best-known of these is Congress's delegation of authority to the Attorney General (originally subject to its legislative veto) to allow deportable aliens to remain in this country in certain specified circumstances. See *INS* v. *Chadha*, 462 U.S. 919, 954-955 (1983); see generally Note, *Private Bills and the Immigration Law*, 69 Harv. L. Rev. 1083 (1956).

government obviously cannot eliminate all instances of erroneous advice on which a private party relies. Indeed, over 150 years ago, when there were only a fraction of the present number of government employees, Justice Story observed that the government's "fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses" if equitable doctrines applicable in private suits were to govern. *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824); see also *Lee*, 11 U.S. (7 Cranch) at 369-370; *The Floyd Acceptances*, 74 U.S. (7 Wall.) at 681. And as this Court recognized in *Hansen*, the losses would not be solely financial; the benefits that statutory or regulatory requirements are meant to ensure (in *Hansen*, for example, the submission of a written application) would be lost as well. 450 U.S. at 789-790.

Litigation generated by the availability of estoppel could itself seriously burden government operations. As in this case, individuals could claim that duly enacted laws defining conditions of eligibility for government benefits did not apply to them because they had solicited and received, or simply taken home with them from government offices, circulars that turned out to contain out-of-date information. Compare, *e.g.*, *Stewart*, 311 U.S. at 70 n.22 ("casual statement" of Secretary of Treasury at congressional hearing); *Utah* v. *United States*, 284 U.S. 534, 545 (1932) (statements made by Special Assistant Attorney General while delivering complaint). The government would then be put on the defensive in each lawsuit, struggling with difficult problems of proof, and putting at risk in each instance the federal fisc.

In addition, a rule allowing estoppel against the government would present an invitation to fraud. That misfortune has long been avoided. In what was probably its first response to a claim of estoppel against the government, this Court declared it better "that an individual should now and then suffer by * * * mistakes [of gov-

ernment officials], than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself." *Lee*, 11 U.S. (7 Cranch) at 370. Accord *Whiteside* v. *United States*, 93 U.S. 247, 257 (1876); see, *e.g.*, *Pine River Logging*, 186 U.S. at 290-291.

At the end of the day, the principal effect of a rule permitting estoppel might well be that the government would give far less advice and make available fewer government publications. Cf. *Hansen*, 450 U.S. at 790-791 & n.5; *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979). That result is unnecessary; the government, like its citizens, is "a loser by the negligence of its officers" (*Hart*, 95 U.S. at 318), and has ample incentive to ensure that dissemination of information is accomplished as carefully and accurately as possible.

We recognize, as has this Court, that the "no estoppel" rule can result in "phases of hardship" to individuals. *Merrill*, 332 U.S. at 383; see, *e.g.*, *Whiteside*, 93 U.S. at 257; accord *Lee*, 11 U.S. (7 Cranch) at 370. But it is beyond the power either of the Executive or this Court to cure that problem. The Court should now make explicit what has been more than implicit in a long line of its decisions—arguments in favor of compensating those who rely on erroneous information supplied by government officials must be addressed to Congress.[37]

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[37] In strong confirmation that it is the appropriate forum for those seeking protection from the damage caused by governmental misrepresentations, Congress recently responded to the type of harm chronicled in *Hansen*. The Omnibus Budget Reconciliation Act of 1989 includes a section providing that, when an individual fails to apply for benefits because of misinformation provided by the agency, the individual will be deemed to have applied on the date the incorrect information was provided. See H.R. 3299, 101st Cong., 1st Sess. § 10302 (1989).

II. THE PRESENCE OF "AFFIRMATIVE MISCONDUCT" DOES NOT AFFECT THIS ANALYSIS

This Court has left open the question whether some type of "affirmative misconduct" by government agents may at times justify estoppel. *Community Health Services*, 467 U.S. at 60-61; *Miranda*, 459 U.S. at 17-18; *Hansen*, 450 U.S. at 788; *Hibi*, 414 U.S. at 8-9; *Montana*, 366 U.S. at 314-315.

"Misconduct," however, is already a precondition of an estoppel. There must be "conduct—acts, language, or silence—amounting to a representation or concealment of material facts," although not necessarily amounting to fraud. 3 J. Pomeroy, *supra*, § 805, at 191, 192-194. As we show below, there is no correlation between "misconduct" in any particular case and the need for or justifiability of estopping the government. Rather, this Court has rightly held that the misrepresentations of government officials are relevant only insofar as they make enforcement of a statute, as written, inconsistent with the constitutional demands of due process or because they operate to deprive a person of the fair notice required by the statute itself. In such circumstances, the issue is no longer one of "estoppel"; government "nonenforcement" is compelled by constitutional command or because the statute by its terms has been rendered inapplicable.

A. The presence of egregious misconduct, in and of itself, does not direct the application of estoppel as a remedy

The degree of official misconduct has no impact on whether the United States has waived its sovereign immunity, since effecting such a waiver is not within the power of Executive officers. See, *e.g.*, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940).

Moreover, the degree of misconduct does not alter the fact that it is beyond the Executive's authority to give

effect to the errors or misconduct of its employees in violation of laws written by Congress, and beyond the authority of the courts to order that result. Estoppel of the government undermines these principles, whether a government employee's actions are merely negligent or rise to some unspecified higher level of fault. It would, in fact, be all the more inconsistent with the underpinnings of the general rule against estoppel for courts to hold that agencies are bound by the actions of their representatives in those situations—and only those situations—in which there can be no doubt that responsible agency officials did not approve and would not approve of their representatives' actions.

Finally, the degree of misconduct by a government agent does not affect the damage done to the public interest when the law is not enforced, nor even correlate reliably with the degree of harm caused by the employee's behavior. See Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws"*, 64 Tex. L. Rev. 1, 42-43 (1985); Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 559-560 (1979). Because the concept of "affirmative misconduct" is flexible enough to encompass a wide variety of actions, it may simply provide discretion for courts to redress harms done in particular cases, without regard to the broader harm to to the public interest that such redress would bring in its wake.

Since an "affirmative misconduct" exception cannot be squared with the doctrinal and policy bases of the "no estoppel" rule, it is not surprising that the lower courts have generated many conflicting, and regularly revised, definitions of the phrase. See Pet. 21-22. In our view, the confusion is inherent in the very concept of an "exception" to the doctrinal mandates that prohibit estoppel of the government. Rather, government action can be affected by its employees' misrepresentations only in narrow circumstances.

B. The misconduct of government officials is relevant only when that misconduct would render subsequent enforcement of a statute unconstitutional or inapplicable by its own terms

Recognition of detrimental reliance is warranted only when, as a result of official misconduct, subsequent enforcement of a statute is rendered unconstitutional or inapplicable on the statute's own terms. Such recognition —which is derived from the underlying substantive doctrines, not estoppel principles—is compatible with this Court's precedents and is capable of coherent and predictable application.

1. This Court has recognized and made allowance for some forms of detrimental reliance induced by "governmental deception." *Community Health Services*, 467 U.S. at 60 n.12 (citing *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973) (*PICCO*)); and *Moser* v. *United States*, 341 U.S. 41 (1951)). Thus, in certain cases involving the application of the criminal laws or of especially draconian civil sanctions, misrepresentation by government officials has been held to deprive the individuals concerned of the fair notice required by the Due Process Clause or by the terms of the relevant statute.

In *PICCO*, for example, the Court ruled that a defendant could not be criminally convicted for violating Section 13 of the Rivers and Harbors Act without an opportunity first to establish the defense that, as a result of a long-standing administrative interpretation of Section 13, it had been "affirmatively misled" into believing that its conduct was not criminal. The Court explicitly identified the argument as analogous to those sustained in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), and *Raley* v. *Ohio*, 360 U.S. 423 (1959). *PICCO*, 411 U.S. at 674. In *Cox* and *Raley*, criminal convictions based on conduct that government officials had effectively assured the defendants was noncriminal were held by this Court to violate the requirements of due process, because the defendants had been denied "fair warning" of the criminality of that

conduct. See *Raley*, 360 U.S. at 437-439; *Cox*, 379 U.S. at 571 (following *Raley*). The Court in *PICCO*, employing implicit if not explicit due process reasoning, similarly determined that the defendant had to be afforded the opportunity to demonstrate that the unique circumstances of the case deprived it of fair warning. 411 U.S. at 674.

The central issue in *Moser* was whether a Swiss national had waived his rights to American citizenship. According to the applicable statute, a resident alien could claim exemption from American military service, but would thereafter be debarred from seeking American citizenship. However, in the apparent belief that an American-Swiss treaty provided an exception for Swiss nationals, the American government literally excised the express waiver provision printed on other exemption applications from the applications for Swiss nationals. Moser signed one such application. In light of these circumstances, the Court found that Moser did not execute the knowing and intentional waiver of citizenship required by elemental fairness. 341 U.S. at 47. The Court thus appeared to interpret the pertinent statute as requiring "an intelligent election" to claim or refrain from claiming an exemption, for it explicitly found "no need to evaluate the[] circumstances on the basis of any estoppel of the Government." *Ibid.* (That reading, in fact, would appear to be necessary if *Moser* is to continue to be good law after *Pangilinan*, *supra*.[38])

[38] To the extent it goes farther, *Moser* appears to adopt due process reasoning. The Court thus cites (341 U.S. at 47) *Johnson* v. *United States*, 318 U.S. 189, 197 (1943), a case that presaged *Raley* v. *Ohio*, 360 U.S. 423 (1959), and turned on very similar facts. In *Raley*, the Court found that the Due Process Clause invalidated a conviction based on refusal to answer questions at a legislative hearing, where the refusal was induced by the Commission's erroneous representation that the witnesses could rely on the state privilege against self-incrimination. (Actually, state law removed the privilege in exchange for legislative immunity.) The Court concluded that to uphold the convictions would be to sanction "the most indefensible sort of entrapment by the State." 360 U.S. at 438. In *Johnson*, the Court held that a defendant could be "entrapped" if a court assured him of his right to withhold his testimony because of the privilege against self-incrimination but then allowed the prosecutor to comment on the defendant's silence. *Johnson* did not speak in due process terms; the Court, rather, determined the case to be inconsistent even with its supervisory authority over the district courts. But the Court has made clear that *Johnson* raised concerns similar to *Raley*. See *Doyle* v. *Ohio*, 426 U.S. 610, 618 n.9 (1976). Finally, in *Moser*, the Court concluded that to rule other than it did "would be to entrap petitioner." 341 U.S. at 47.

In fact, the notion that the government might be subject to estoppel in some instances appears to have arisen in the "citizenship" context. This Court seems first to have raised the possibility in *Montana v. Kennedy*, 366 U.S. 308, 315 n.11 (1961), citing two courts of appeals decisions, *Podea v. Acheson*, 179 F.2d 306 (2d Cir. 1950), and *Lee You Fee* v. *Dulles*, 236 F.2d 885, 887 (7th Cir. 1956), rev'd, 355 U.S. 61 (1957). But neither *Podea* nor *Lee You Fee* was an estoppel decision. In *Podea*, the court found that actions by American officials had *compelled* a native-born American citizen to serve in a foreign army—service that was later claimed to deprive him of American citizenship; thus, there was no voluntary expatriation. 179 F.2d at 309. And *Lee You Fee* contained only dictum that where American officials actually *prevented* individuals' travel to the United States (travel necessary for the preservation of their citizenship) by failing to issue travel orders, the government could not then deprive those individuals of citizenship. Both cases fit easily within the *Moser* rationale that a right to citizenship could not be involuntarily forfeited under applicable statutes.

When official misconduct does not either render subsequent enforcement of a statute unconstitutional or render the controlling statute inapplicable by its own terms, this Court has held that highly blameworthy behavior—even that which amounts to "an affirmative undertaking to raise or surrender a public right" (*Stewart*, 311 U.S. at 70)—is not sufficient to justify estopping the government.

See, *e.g.*, *Hibi*, 414 U.S. at 8-9 (no estoppel where government failed fully to publicize rights under statute and to station authorized naturalization representative in the Philippines); *Miranda*, 459 U.S. at 19 (no estoppel where INS failed to act on visa petition for 18-month period); *Automobile Club*, 353 U.S. at 183-184 (no estoppel where IRS Commissioner, who had made erroneous ruling, sought to apply corrected ruling retroactively); *Merrill*, *supra* (no estoppel where government agent erroneously advised farmers that their crop was insurable and aided their application to government); *Stewart*, *supra* (no estoppel despite publication of misleading statements in circulars and bulletins of Farm Loan Board); *San Francisco*, 310 U.S. at 31-32 (no estoppel where government sought to enforce provisions of Raker Act in manner contrary to earlier administrative rulings by Interior Department); *Pine River Logging*, 186 U.S. at 290-291 (no estoppel where government agents knew of and supervised cutting of timber in excess of contract).

2. Recognition of detrimental reliance in the limited situations presented by cases like *PICCO* and *Moser* raises none of the doctrinal problems that inhere in the concept of estoppel. A waiver of sovereign immunity for review of action "otherwise not in accordance with law" necessarily includes consent to review of actions that violate the Constitution, or the terms of a statute. Moreover, the suggested approach raises no separation of powers concerns. If application of a statute would violate a constitutional right, a court is, of course, justified in refusing so to apply it. And, if circumstances rendered the statutory terms themselves inapplicable, judicial determination of that fact would be a traditional exercise of the courts' proper authority.

3. Such limited recognition of detrimental reliance has been, and is, capable of ready and coherent application. The conduct at issue is tied to the harm caused, providing protection when protection is constitutionally or legally essential. By contrast, to allow estoppel on the basis of some vague standard of "affirmative misconduct" would only perpetuate the current state of confusion.

C. The negligent conduct that occurred in this case does not affect either constitutional or statutory rights

Due process is "simply not implicated" by the negligent actions of government officials. *Daniels* v. *Williams*, 474 U.S. 327, 328 (1986). The "lack of due care" that characterizes negligent acts, while blameworthy in tort, does not represent the "abuse of power" (*id.* at 332) or its use as "an instrument of oppression" (*Davidson* v. *Cannon*, 474 U.S. 344, 348 (1986)) against which the Due Process Clause was meant to guard. Without more, therefore, the negligent misrepresentation of a government official cannot affect the application of a statute.

Nor are constitutional or statutory problems of fair warning generally raised by Executive errors. "Every citizen of the United States is supposed to know the law." *The Floyd Acceptances*, 74 U.S. (7 Wall.) at 682. See, *e.g.*, *Community Health Services*, 467 U.S. at 63; *Merrill*, 332 U.S. at 384-385; *Wilber Nat'l Bank*, 294 U.S. at 123-124; *Sutton*, 256 U.S. at 579; *Hart*, 95 U.S. at 318; *Whiteside*, 93 U.S. at 257. Those who deal with the government, therefore, may not rely on the conduct of government agents contrary to law. *Community Health Services*, 467 U.S. at 63; *Merrill*, 322 U.S. at 384. Indeed, the whole point of publishing the law, from the codification of statutes to the presentment of rules and regulations in the Federal Register (see 44 U.S.C. 1507 (1982)), is to give the people an authoritative source for the laws that regulate their society. On that premise, civil and criminal law enforcement depends. And the occasions when such notice does not suffice are rare. See, *e.g.*, *PICCO*, *supra*. Nothing in this case supports such an exception here.

III. EVEN IF THE GOVERNMENT MAY BE ESTOPPED UNDER SOME STANDARD OF AFFIRMATIVE MISCONDUCT, NO ESTOPPEL IS WARRANTED HERE

A. Since respondent is charged with knowledge of the law, his reliance on erroneous advice was not reasonable

In *Community Health Services*, this Court held that "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." 467 U.S. at 61. Thus, the party claiming an estoppel must show that it relied to its detriment on its adversary's conduct, and that such reliance was reasonable in that the party claiming the estoppel "did not know nor should it have known that its adversary's conduct was misleading." *Id.* at 59.[39]

Any reliance by respondent on the erroneous advice he received in this case was not reasonable. Indeed, this Court made clear in *Community Health Services* that reliance on the words of a government employee that contradict the terms of a published statute or regulation can never be "reasonable": "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Community Health Services*, 467 U.S. at 62. In particular, "[p]rotection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law." *Ibid.* Respondent and others are on notice of the administrative regulations controlling

[39] Indeed, even between private parties, estoppel cannot be applied "[i]f, at the time when he acted, [the party seeking estoppel] * * * had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant." 3 J. Pomeroy, *supra*, § 805, at 192 (quoted in *Community Health Services*, 467 U.S. at 59 n.10).

the funds they seek. See *Merrill*, 332 U.S. at 384-385; *Community Health Services*, 467 U.S. at 63. *A fortiori*, such persons are "charged with knowledge of the United States Statutes at Large." *Merrill*, 332 U.S. at 384.

Nor does the fact that a government official furnished respondent a government circular containing out-of-date information affect his duty "to know the law." Although this Court in *Community Health Services* pointed to the oral nature of the advice given there as a factor in its analysis of the reliance element (see 467 U.S. at 65), it did not suggest that reliance is reasonable whenever advice is in writing. Indeed, this Court and the lower federal courts have regularly declined to estop the government despite the fact that some misrepresentation was committed to paper. See pp. 22-23 and note 20, *supra*. By abandoning this precedent, the court below has conferred estoppel claims on any number of individuals who may have picked up or negligently been given circulars containing out-of-date information.[40]

[40] The Federal Circuit's broad finding of reasonable reliance also conflicts with the decisions of a number of other circuits. The Seventh Circuit, for example, has held that, except in narrow circumstances not relevant here (see, *e.g.*, *Portmann* v. *United States*, 674 F.2d 1155, 1167 (1982)), a party claiming a misrepresentation by a government official is "charged with knowledge of the law" and thus cannot demonstrate the reliance traditionally required to support estoppel. See *In re Larson*, 862 F.2d 112, 114-115 (1988); *Crown* v. *United States Railroad Retirement Board*, 811 F.2d 1017, 1020-1021 (1987). Similarly, the First Circuit has recognized that after *Community Health Services*, individuals are "properly charged with knowledge of the requirements [of law]." *Falcone* v. *Pierce*, 864 F.2d 226, 230-231 (1988). The Tenth Circuit has held that a party relying on an erroneous interpretation of a regulation by an administrative agency "assume[s] the risk" that the interpretation is erroneous. See *Emery Mining Corp.* v. *Secretary of Labor*, 744 F.2d 1411, 1416 (1984); *United States* v. *Browning*, 630 F.2d 694, 702-703 (1980). The D.C. Circuit has agreed. *Boulez* v. *Commissioner*, 810 F.2d 209, 218 n.68, cert. denied, 484 U.S. 896 (1987).

B. There was no such affirmative misconduct here as would suffice to estop the government

Should this Court decide that the estoppel doctrine warrants an exception based on some standard of affirmative misconduct, such an exception would not in any event apply here. The misrepresentations made by the Navy employees in this case cannot be distinguished from the behavior of other government agents that the Court has found to fall "far short" of affirmative misconduct. *Hansen*, 450 U.S. at 790 (quoting *Montana*, 366 U.S. at 314).

In *Schweiker* v. *Hansen*, a Social Security Administration claims representative incorrectly informed a claimant that she could not qualify for benefits and failed, contrary to the agency's claims manual, to recommend that she file a written application. 450 U.S. at 786. Because a written application was required under agency regulations (*id.* at 790), the claimant lost her entitlement to approximately 12 months of benefits for which she was otherwise eligible. In *Montana* v. *Kennedy*, an American consular official erroneously advised the petitioner's mother that she could not travel to the United States because she was pregnant. Consequently, the petitioner was born abroad and could not claim American citizenship by birth. In these cases, as in a number of others (see cases reviewed above, pp. 41-42, *supra*), the Court rejected a claim of estoppel on the basis of conduct of government agents at least as careless and far more damaging than that involved here.

The court of appeals sought to distinguish this case on the ground that one of the government agents gave the respondent *written* misinformation. See Pet. App. 4a, 10a-11a. Although written information may induce greater reliance than oral information (*Community Health Services*, 467 U.S. at 65), this Court has never suggested that an Executive agent, in a country and a government "that work[] overwhelmingly by paper" (Raven-Hansen, *supra*, at 55), commits "affirmative misconduct" whenever he or she negligently passes on misinformation

in writing. To the contrary, the Court has made clear that any concept of "affirmative misconduct" requires more egregious behavior. The employees here, like the claims representative in *Hansen*, negligently provided outdated information; they did not deliberately mislead the respondent, make false promises, or otherwise defraud him. See 450 U.S. at 790 (quoting *Montana*, 366 U.S. at 314); cf. *Schime* v. *Bowen*, 822 F.2d 7, 9 (2d Cir. 1987) (case in which erroneous advice about eligibility for benefits was conveyed in writing is indistinguishable from *Hansen*). There was, in short, nothing approaching "affirmative misconduct" in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1989

APPENDIX

Attachment 4 to FPM Letter 831-64

OFFICE OF PERSONNEL MANAGEMENT

INFORMATION TO APPLICANTS FOR DISABILITY RETIREMENT

Your agency's review of your employment records shows that you are eligible for regular voluntary retirement. We want to be sure that you know the advantages and disadvantages of a disability retirement, which are discussed below.

1. *Amount of Annuity*: For you the dollar amount of your retirement annuity will be the same whether you retire on a disability annuity or whether you retire voluntarily based on your age and service. The guaranteed minimum disability annuity provision in the retirement law does not benefit an employee who has approximately 27 years of Federal service or who is age 60 or older.

2. *Taxes*: You may not be aware that there have been changes in the Internal Revenue Code. These changes, to a large extent, do away with the tax advantage that civil service disability retirees formerly received. Under current law there is no tax benefit unless the taxpayer is totally disabled for *all* gainful employment. Since our decision on your application must be based only on whether you are disabled for your current position, or a vacant position of equal grade or pay, a finding of disability by the Office of Personnel Management does not meet the Internal Revenue Service's requirement. If your application is based on the belief that civil service disability retirement will result in a tax advantage, we suggest that you check with your local Internal Revenue Office for current tax information.

3. *Other Benefits*: Other benefits, such as paid-up commercial life insurance policies, which may result from a finding of total disability, are often tied to the Social Security definition of disability. Here again, if your disability application is based on the belief that its approval will result in some other benefit, we suggest that you check with the appropriate source to find out whether a finding of disability for civil service retirement will meet the criteria.

4. *Sick Leave*: Whether you apply for disability retirement or voluntary retirement because of disability, you may choose either to use all (or part) of your sick leave prior to separation, if eligible—or to have the sick leave used to extend your length of service in the annuity computation. Approval for use of sick leave is not automatically granted upon submission of an application for either type of retirement. A request for approval of sick leave must be made to your agency, and you must provide them with such evidence of your incapacitation (usually a detailed medical certification) as they may require. Even if sick leave is approved, your agency may periodically request additional evidence of continued incapacitation, particularly during the period of sick leave prior to voluntary retirement because of disability or prior to the approval of disability retirement.

5. *Disability Requirements*: Unless the Office of Personnel Management determines that your disability is permanent, you must undergo annual examinations until you reach age 60. Also, every disability annuitant who is under 60 years of age must report his/her annual income from wages or self-employment in such detail as the Office of Personnel Management may require. When, in each of two consecutive years, your income from wages or self-employment equals at least 80 percent of the current rate of pay for the position from which you retired, your earning capacity is deemed restored and your disability annuity is stopped.

If your disability retirement annuity benefit is stopped due to either a recovery from the disabling condition that established your entitlement to a disability benefit or restoration to earning capacity, you will be eligible for a retirement benefit based on age and service. This benefit would begin no sooner than the day after your disability annuity stopped but it would not include the cost of living increases that were applied to the disability annuity.

6. *Processing Delays*: Applications for disability retirement take longer to process than voluntary retirements. In many cases, there is not enough medical or other information in the file, when it comes up for review by a staff medical officer, to reach a decision. This means that we must go back to the employee, or the doctor for additional medical evidence. In some cases it is even necessary to offer the employee a medical examination by a doctor designated by our Medical Division. The doctor designated specializes in the disease or inquiry claimed by the employee. Quite often, too, we have to contact the employee's agency to secure information about the quality of the employee's performance in the position occupied. Naturally, this means that an employee who has used all of the leave to his or her credit may be without money before a final decision can be made on the disability claim.

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In The

Supreme Court of the United States

October Term, 1989

OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

CHARLES RICHMOND,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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QUESTIONS PRESENTED

1. Whether the federal government may be equitably estopped.

2. Whether the Office of Personnel Management should be estopped in this case because it provided the claimant with an unambiguous, but erroneous, written statement of the law on which he relied to forfeit his vested annuity.

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No. 88-1943

In The

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October Term, 1989

OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

CHARLES RICHMOND,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

In January 1986, respondent Charles Richmond, a retired federal employee, visited the office of his former employer, the Navy Public Works Center, specifically to inquire about his continued right to a disability annuity. Concerned as to whether he should accept an unusual opportunity for temporary work, he explicitly directed his inquiry at the rules relevant to the permissible earnings of a disability annuitant.

Both on that occasion and on a later one, the civilian specialists employed to provide assistance to retirees gave him an official publication prepared by the petitioner, the Office of Personnel Management (OPM), which purported to detail the law on earnings for disability

retirees. In fact, the OPM publication was in error, as the law had changed several years before, but Mr. Richmond relied on the unambiguous OPM explanation and undertook the additional work in 1986. As a consequence, his annuity was suspended in 1987.

1. After service as a Green Beret with the United States Army in Vietnam, Mr. Richmond completed a four-year apprenticeship program and became a civilian welder employed by the Navy Public Works Center in San Diego, California. Richmond Appeal to Merit Systems Protection Board (July 3, 1987) (hereinafter "MSPB Appeal").[1] Because of vision problems which were aggravated by the conditions of his welding job, however, he was ultimately forced to seek a disability retirement. Mr. Richmond filed his retirement application with the Navy's Civilian Personnel Department. "Informal Brief of Petitioner," at 3 (June 21, 1988), in *Richmond v. OPM*, No. 88-3243 (Fed.Cir.). Based on this application, OPM determined that his disability prevented him from performing his job and, accordingly, found him eligible for a permanent disability annuity, effective June 6, 1981. Pet. App. 21a.

2.a. Under the federal government's retirement program, a federal employee with five or more years of civilian service who is found disabled by OPM may retire and receive an annuity. 5 U.S.C. § 8337(a). Disability is established when the employee is determined "to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment . . . ." *Ibid.*

If the retiree recovers from his disability or his earning capacity is deemed to have been restored, his annuity is terminated. 5 U.S.C. § 8337(d); see, *e.g.*, *Lancellotti v.*

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[1] At all administrative levels and in the Court of Appeals for the Federal Circuit, Mr. Richmond represented himself. He signed all pleadings and letters in presenting his position and petitioning to those tribunals.

OPM, 704 F.2d 91, 93 (3d Cir. 1983). In the event of restoration of earning capacity, discontinuance of the annuity begins six months after the end of the calendar year in which the earning capacity was considered to have been restored. 5 U.S.C. § 8337(d).

Receipt of the annuity is thus premised on two separate factors, the categorical requirement of disability and the income requirement of lost earning capacity. See *Crockett v. OPM*, 783 F.2d 193, 195 (Fed.Cir. 1986). The latter factor is defined in the statute through a simple, but blunt, measurement: "Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement." 5 U.S.C. § 8337(d). It is thus an objective limit which changes each year as the "current rate of pay of the position" formerly held by the retiree is enhanced by cost-of-living increases. See, *e.g.*, *McLean v. OPM*, 800 F.2d 254, 255 (Fed.Cir. 1986). Accordingly, retirees who are able to obtain occasional work must seek assistance from the agency in order to keep abreast of the rules and avoid the Draconian all-or-nothing effect of the 80% demarcation line. See *Lancellotti v. OPM*, 704 F.2d at 99-100.

b. Prior to 1983, restoration of earning capacity had a more narrow meaning, thus allowing retirees greater latitude in their earnings. In that incarnation, earning capacity was "deemed restored if in *each of 2 succeeding calendar years* the income . . . equals at least 80 percent of the current rate of pay . . . ." 5 U.S.C. § 8337(d) (1976) (emphasis supplied). A 1982 amendment, Pub. L. No. 97-253, § 302(a)(2), 96 Stat. 792, thus changed the frame of reference from two consecutive one-year periods to a single one-year period. As a result, instead of an annuity continuing when income exceeded the 80% limit in one year, it was terminated after the limit was reached in any given year.

3. After disability forced him to retire from his welding job in 1981, Mr. Richmond found work as a part-time

school bus driver, with average annual earnings of $12,494. Pet. App. 21a; see also Richmond Request for Reconsideration (May 29, 1987), attached as exhibit to OPM's "Informal Brief" (filed July 15, 1988), in *Richmond v. OPM, supra* (hereinafter "Recon. Request"). Because of his continuing disability and because his earnings were considerably below 80% of the then-current pay scale of his former position with the Navy, he received his annuity every year up to 1987.

His income for 1986, though, was $19,936, which was higher than in the past because he had accepted additional work, "overtime that was not available in other years." Pet. App. 12a; see also Pet. App. 21a. As 80% of the 1986 salary for his previous position was $19,016.74, OPM determined that his earnings in 1986 had exceeded the limit and therefore terminated his annuity six months after the end of 1986. Pet. App. 21a. The additional work in 1986 was temporary, however, so that his 1987 earnings were only about $15,000, well below the 80% level; accordingly, since he was still disabled, his annuity was restored in 1988. Pet. App. 1a n.1.

4. The temporary work in 1986 placed his annual earnings about 3.9% above the point at which earning capacity was deemed to be restored. But, by performing this overtime, he lost half of his annual annuity. This seemingly irrational exchange was not caused by a mistake or misunderstanding on his part, but, rather, by the admittedly incorrect information consistently provided to him by his former employer, the Navy, and by the institution responsible for administering his pension, OPM.

This situation had its genesis when his present employer advised Mr. Richmond that there would be an opportunity for extra work for a few months in 1986, but that, because of changes in school schedules, the workweek in 1987 and 1988 would be only about 25 hours. Recon. Request. With this information in mind, in January 1986 he returned to the Navy Public Works Center's Civilian Personnel Department, where he had previously applied for his disability pension, and specifically

inquired about the potential effect of the additional work in 1986. At that meeting, an Employee Relations Specialist informed him that earning capacity was measured by reference to two consecutive years; only if earnings exceeded the limit in each of the two years would earning capacity be deemed to have been restored. This information was confirmed when the Employee Relations Specialist gave him a copy of the official publication of the responsible agency, OPM's Federal Personnel Manual (FPM) Letter 831-64, Attachment 4. Pet. App. 22a; Recon. Request; MSPB Appeal. The FPM Letter had been correct when first published in 1981, but OPM had not changed it in the years between the 1982 amendment and Mr. Richmond's 1986 effort to determine his rights and responsibilities under the law.[2]

Given the opportunity for additional work in one year only, and armed with the "knowledge" that the earning capacity test extended over two years, Mr. Richmond made his decision: "I knew I would not exceed my limit in a two year period because this was a temporary condition, so I took advantage of the [additional] earning[s] to pay past debts and to prepare for the cutback in the 1987-1988 school year." Recon. Request; see also Pet. App. 3a. As the sole support of his wife and two minor children (MSPB Appeal), he thus drew an economically logical conclusion based on his financial situation, the prospect of higher temporary earnings, and the parameters of the earning capacity test which the responsible

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[2] OPM still had not withdrawn or replaced the FPM Letter as of January 1987, when a different Employee Relations Specialist repeated the information and gave him another copy of the same incorrect publication. Recon. Request. Indeed, OPM was so derelict in correcting this crucial misinformation that, when Mr. Richmond set up a new meeting for May 1987, the Civilian Personnel Department asked him to "bring the updated information so that they could make a copy for their files." *Ibid.*

federal agency had explained to him orally and in writing.

Indeed, based on the information imparted to him, his reasoning was impeccable. His wages were not close to the earning capacity limit that, according to OPM, was applicable. In both the years before and after 1986, which were relevant pursuant to FPM Letter 831-64, his earnings were well below the limit; his 1986 income, therefore, should have had no effect on his disability pension. As a consequence of that extra work, however, his wages were slightly over the one-year limit; he therefore lost half of his 1987 annuity because of "misinformation upon which he relied . . . ." Pet. App. 22a.

5. After timely filing his 1986 earnings report with OPM, Mr. Richmond was informed, for the first time, that the earning capacity test was applicable to a single year. Recon. Request. By letter dated May 12, 1987, OPM formally notified him that his 1986 earnings exceeded the limit: "Therefore, you are considered to be restored to earning capacity and are no longer entitled to continue receiving a monthly disability benefit, even though your medical condition may not have changed." Pet. App. 25a. Unlike FPM Letter 831-64, the form letter announcing termination of his annuity explained clearly and succinctly that "a disability annuitant who . . . earns, *in any calendar year*, at least 80 percent of the current rate of basic pay for the position occupied immediately before retirement is considered to be restored to earning capacity." Pet. App. 25a (emphasis added).

Mr. Richmond appealed OPM's decision on the ground that the government should not be permitted to apply the revised § 8337(d) when it had consistently responded to his requests by detailing the terms of the original § 8337(d). This argument was ignored by OPM's Reconsideration and Debt Collection Division (letter of June 12, 1987, attached as exhibit to OPM's "Informal Brief"), and then rejected by an MSPB Administrative Judge. Pet. App. 22a. Upon the MSPB's denial of his

petition for review (Pet. App. 32a), he brought his claim to the Federal Circuit.

6. The majority opinion for the Court of Appeals noted initially that this Court had recently refused to acquiesce in the government's urging that equitable estoppel should never apply to the government. Pet. App. 4a-5a. It then found that the traditional elements of estoppel were satisfied, including that he had reasonably relied on consistently wrong information provided by the government:

> [D]espite his diligence, Richmond remained ignorant of the true state of the law, and relied on the government's representations to his injury . . . .[A]ccording to *all* the information the government had provided Richmond, he was safe in accepting what additional, temporary wages he could earn in calendar year 1986. Richmond thus did not get conflicting advice that could have confused him; he got consistent advice that misled him.

Pet. App. 9a (emphasis in original).

The court also determined that the government's behavior was sufficiently egregious as to satisfy the affirmative misconduct standard, which this Court had long since established as a necessary condition for estopping the government:

> [T]he government's action in providing Richmond with an OPM letter which summarized a law which had been changed some 4 years earlier is sufficient "misconduct" for estoppel to apply. To provide such a letter to an individual who apparently made specific requests for current written information through what appeared to be the correct channels is reckless, at the very least. That it was "affirmative" conduct cannot be disputed.

Pet. App. 9a-10a.

The majority also made several other observations drawing on this Court's estoppel holdings. First, it held that "the logic of the landmark decisions leads to the

conclusion that the most crucial consideration is the objective reasonableness of the reliance." Pet. App. 11a-12a (citation omitted). This case therefore differed from those in which the reliance had hinged on oral advice, or on advice "from persons who were not cloaked with the mantle of authority to speak for the government as to legal requirements." Pet. App. 12a (citations omitted).

Secondly, the majority emphasized that Mr. Richmond's inquiries, and his consequent actions, were reasonable and not manipulative: "[T]his is not a case where . . . an annuitant was offered a raise that would put him permanently over the limit, but asked the employer to decrease the raise in order to stay under the limit so as to maintain eligibility." Pet. App. 12a.

Thirdly, the court recognized the important role that fairness plays in estoppel: "[I]t seems quite unfair to conclude that because of [the government misstatement], estoppel is automatically unavailable. It would seem, rather, that this 'but for' relationship presents precisely the situation where estoppel is most appropriate." Pet. App. 13a.

Finally, the majority concluded that it was incorrect to treat his reliance as unreasonable because of "rigid adherence to the axiom" that everyone is presumed to know the law. Pet. App. 13a. Highlighting the contrast between this recipient of a pension and a corporation doing business with the government, the court noted that "Mr. Richmond is not in the government annuities business and cannot reasonably be presumed to know the specific statutory provisions as they change from time to time." Pet. App. 13a.

Indeed, it was precisely because of his status as an individual untrained in the law, and therefore without the experience necessary to obtain the relevant information, that he sought assistance from the very government sources which are authorized to supply this information, the trained specialists of his former employer and the administrator of the government's pension program.

They provided written confirmation of the relevant rules: "The OPM letter was obviously intended as guidance for all disability annuitants, was printed under OPM's letterhead, was addressed to 'Heads of Departments and Independent Establishments,' and was signed by the Acting Deputy Director." Pet. App. 13a-14a.

In light of these "unusual and extreme" factors, the court below concluded, this was a proper situation for estopping the government: "Estoppel, after all, being equitable, necessarily is based on preserving fairness on the specific facts of the case before the court." Pet. App. 14a.

The dissenting judge believed that estoppel was inappropriate in this instance because of its similarity to other cases in which this Court had declined to estop the government. He contended, for instance, that "*Schweiker v. Hansen*, 450 U.S. 785 (1981) [is] a case strikingly similar to the one we decide today . . . ." Pet. App. 15a. The dissent's legal analysis was also colored in part by a belief that Mr. Richmond did not come before the court with clean hands and was therefore not deserving of equitable relief. Pet. App. 19a.[3]

SUMMARY OF ARGUMENT

1. OPM's bold statements about the history of equitable estoppel in this Court are belied by the reality of events. Not only has the Court consistently refused to state that estoppel of the government is impermissible, but it has, on two occasions, estopped the government.

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[3] OPM has withdrawn its similar allegation of unclean hands. In its request for review, the agency contended that "the heart of this lawsuit" was Mr. Richmond's attempt "to manipulate the law for his personal gain . . . ." Pet. 14. Nothing in its brief on the merits, however, suggests that Mr. Richmond's effort to elicit relevant information from the agency administering his pension was improper.

In a series of decisions, the Court has repeatedly suggested that estoppel would have been appropriate had the government's misconduct so demanded. In particular, in *Schweiker v. Hansen*, 450 U.S. 785 (1981), and *Heckler v. Community Health Services*, 467 U.S. 51 (1984), the necessary implication of the Court's analyses was that, in certain situations, considerations favoring estoppel take precedence over those against estoppel. The lower courts and the commentators have responded by assuming that the government is susceptible to estoppel.

Twice, this Court has in fact estopped the government, as it recognized in *Community Health Services*, 467 U.S. at 60 n.12. In *Moser v. United States*, 341 U.S. 41 (1951), a case structurally identical to this one, the Court employed estoppel language and analysis to conclude that reliance upon misleading information from the government should not cause the loss of a vested right. Similarly, reliance on the responsible agency's long-standing written misinterpretation of a statute served as the Court's basis for prohibiting the government from applying the actual statute in *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973) ("*PICCO*").

2.a. OPM's sweeping view of the effect of sovereign immunity on estoppel ignores the historical development of the two concepts. The latter has evolved as an effective instrument of equity to reconcile competing factors and achieve justice in individual cases. Sovereign immunity, by contrast, has suffered from significant erosion over the years, so that it is no longer viewed as a barrier against estopping the government. Accountability is now considered the more important consideration. The Court's analysis in *Moser* and its willingness to extend benefits to disfavored classifications as a similar remedial tool are indicative of the modern view, which is expressed in this context by a recognition that the tensions are best balanced by rendering it difficult, but not impossible, to estop the government.

Accordingly, because the remedy of estoppel is a procedural device deriving from the equitable powers of

the judiciary, OPM's arguments that no statutory provisions provide a waiver of immunity are irrelevant. Moreover, the agency is mistaken in contending that the exclusion of misrepresentation from permissible torts under the Federal Tort Claims Act bears on the issue of estoppel against the government. Estoppel and the tort of misrepresentation are not comparable concepts, so that no legislative intent regarding estoppel can be inferred from the exclusion.

b. Similarly, OPM's contention that estoppel against the government violates separation of powers principles ignores the development of that doctrine, which is regarded as flexible and realistic. See, *e.g.*, *Mistretta v. United States*, 109 S.Ct. 647, 659 (1989). The limited corrective effect of estoppel does not rise to the level of encroachment by one branch at the expense of another which implicates the separation of powers doctrine. Indeed, estopping the government preserves the separation of powers by ensuring that reckless misdeeds by the executive will not be allowed to defeat the overall will of Congress.

Moreover, the fact that Congress passes legislation which recognizes specific reliance interests does not imply that judicial remedies to correct governmental injustice are impermissible. Estoppel was not crafted to provide relief for every wrong caused by reliance on the government, and the fact that Congress has taken the initiative in some situations does not imply that estoppel is unavailable in all situations.

c. The very notion of estoppel demonstrates that the public interest is served by allowing its application to the government. OPM's dire predictions as to the impact of estoppel have been contradicted by actual experience, as the lower courts for years have accepted the possibility of estopping the government but have applied it only in the most extreme circumstances. It has never been employed in run-of-the-mill situations, and the relevant factors, including affirmative misconduct, will ensure that courts continue to use it sparingly. Past practice and common

sense demonstrate that, in this restrictive application, estoppel causes neither unacceptable administrative burdens nor collusion. Since the purpose of estoppel is to prevent injustice, it is entirely appropriate that this limited remedy remain available in situations where egregious government misbehavior justifies corrective action.

3.a. A number of significant factors distinguish this situation from cases in which this Court refused to estop the government. Here, reliance induced the loss of a vested right and that loss could not be corrected by taking other action. Furthermore, Mr. Richmond sought the crucial information from the right source, and received an unambiguous written statement prepared by the responsible agency. In addition, the government was here acting in a proprietary capacity comparable to the role performed by the administrator of a private pension plan; this was not the government as sovereign.

b. OPM contends that Mr. Richmond's reliance was not reasonable, premising its argument solely on the legal fiction that everyone is presumed to know the law so that it is never reasonable to rely on the government. This Court repudiated that strict axiom in *Moser* and *PICCO*, as it based its conclusion on a review of all the relevant circumstances. Had the Court imputed comprehensive legal knowledge to those claimants, it would have been required to rule against them. Similarly, the Court relied on a number of factors in *Community Health Services*; it did not predicate its refusal to estop the government on an assumption of unrealistic familiarity with the law. Accordingly, courts should presume a reasonable knowledge of the law, and determine the reasonableness of reliance from the totality of circumstances. The court below was thus correct in finding the reliance here to be reasonable.

c. This Court has repeatedly indicated, and the lower courts have accepted, that there must exist an additional factor, affirmative misconduct, in order to estop the government. The most logical and practical interpretation of

that term is that the governmental misconduct should be reckless. Under this standard, estoppel will not apply to everyday instances of negligence but only to those unusual situations where the government's misbehavior, in light of several factors, is considered extreme.

In this case, contrary to OPM's argument, the misconduct went far beyond a mere casual mistake. This was a persistent and ongoing failure of the responsible agency to correct a written statement of the law on which OPM's annuitants were dependent. It is precisely the kind of excessive behavior, as the Court of Appeals found, which warrants applying estoppel in order to preserve public confidence in the government.

ARGUMENT

I. AS THIS AND OTHER COURTS HAVE DETERMINED, IT IS APPROPRIATE, UNDER CERTAIN LIMITED CIRCUMSTANCES, TO ESTOP THE GOVERNMENT

OPM premises its argument on a series of exaggerated characterizations of the law which ignore both the complex history of this issue and the repeated holdings by the federal courts, including this Court, to the effect that estoppel against the government is permitted in limited circumstances. The agency compounds this error by finding support in broad statements of alleged policy, such as its suggestion that estopping the government is akin to allowing the "treasury [to be] raided as a result of the random errors of misinformed employees and officials." Brief for the Petitioner (hereinafter "Gov't Br.") 12.

This implication that permitting estoppel against the government will result in a legion of chaotic attacks on government processes and the public fisc is not just overblown rhetoric; experience has shown it to be factually inaccurate. Between the traditional standards for estoppel, and this Court's additional requirement that the government's action amount to "affirmative misconduct", the

number of instances in which the government has been estopped are, to say the least, infrequent.

It may be accurate to say that the law disfavors estoppel against the government, and certainly it is true that this Court, more often than not, has declined to estop the government. But, as the lower courts and the commentators have consistently noted, the Court has not only failed to hold that there can be no estoppel against the government; it has in fact estopped the government on occasion. OPM has advanced no grounds for holding

> that there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.

Heckler v. Community Health Services, 467 U.S. 51, 60-61 (1984) (emphasis in original; footnote omitted).

A. On numerous occasions, this Court has indicated that there exist circumstances in which it is proper to estop the government.

In a series of decisions, the Court has consistently refused to hold that the government may not be estopped and suggested that, in the given case, the government would have been estopped had its misconduct been sufficiently extreme to so warrant. *Montana v. Kennedy*, 366 U.S. 308, 314-315 (1961); *INS v. Hibi*, 414 U.S. 5, 8 (1973); *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981); *INS v. Miranda*, 459 U.S. 14, 17 (1982); *Community Health Services*, 467 U.S. at 60.

In *Hansen*, the Court strongly implied that estoppel against the government was not prohibited. Significantly, it first observed that it had "never decided what type of conduct by a Government employee will estop the Government . . . ." 450 U.S. at 788. It then noted that the lower courts have sometimes decided not to estop the government because of a Supreme Court decision which advised

courts " 'to observe the conditions defined by Congress for charging the public treasury,' " *ibid.* (quoting *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947)), and added: "This is another in that line of cases, for we are convinced that [the federal employee's] conduct . . . does not justify the abnegation of that duty." 450 U.S. at 788-789 (footnote omitted). The holding's necessary implication is that, in appropriately limited circumstances, countervailing considerations will permit the abnegation of that duty.[4]

Similarly, the decision in *Community Health Services* represented more than just a refusal to prohibit estoppel against the government, as had been requested. See 467 U.S. at 60. First, the Court noted that the public interest in not having the rule of law undermined has been satisfied by requiring that "the Government may not be estopped on the same terms as any other litigant." *Id.* at 60 (footnote omitted). Again, the unstated but implicit counterpart is that the government will be estopped when those other terms are met.

Secondly, the Court recognized that it had previously decided at least two cases which "seem to rest on the premise that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." *Id.* at 60 n.12. The ramifications of this observation were apparent: since the Court had previously found that the government could not enforce the law in certain situations, it had repudiated the suggestion that there could *never* be circumstances sufficient to relinquish its duty to carry out the will of Congress. This was viewed as a

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[4] See also *id.* at 791 (Marshall, J., dissenting) ("majority goes on to suggest that estoppel may be justified in some circumstances"); *Morgan v. Heckler*, 779 F.2d 544, 546 (9th Cir. 1985) (Kennedy, J.) ("unclear whether the injury complained of here is severe enough to justify estopping the government from enforcing congressionally mandated eligibility requirements").

sufficiently significant statement of the law that two Justices joined in a concurring opinion designed to demonstrate that the decisions at issue had not been premised on principles of equitable estoppel. *Id.* at 68 (Rehnquist, J., concurring in the judgment).

Thirdly, *Community Health Services* confirmed that the fairness considerations long associated with estoppel were also applicable when the government was the responsible party. In addition to the strong suggestion favoring governmental "decency, honor, and reliability", the Court detailed several instances where Justices and judges had previously emphasized the importance of the equitable considerations innate to estoppel. *Id.* at 61 n.13. Given the holding that estoppel was not warranted because not even the traditional elements were met, it is significant that the Court elaborated at length on the equitable principles which provide the analytical framework of the concept.

The lower courts have responded to these analyses by assuming that estoppel against the government is permitted. See 4 K. Davis, *Administrative Law Treatise*, at 17 (2d ed. 1983) [hereinafter *Davis 1983*]; *Portmann v. United States*, 674 F.2d 1155, 1163-1164 (7th Cir. 1982). Indeed, every federal appellate court has either explicitly or implicitly accepted that the government could be estopped in certain circumstances.[5] Similarly, the

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[5] See, *e.g.*, *Boulez v. C.I.R.*, 810 F.2d 209, 218 n.68 (D.C.Cir. 1987); *Best v. Stetson*, 691 F.2d 42, 44 (1st Cir. 1982); *Corniel-Rodriquez v. United States*, 532 F.2d 301, 306 (2d Cir. 1976); *United States v. Asmar*, 827 F.2d 907, 911 & n.4 (3d Cir. 1987); *West Augusta Development Corp. v. Giuffrida*, 717 F.2d 139, 140-141 (4th Cir. 1983); *Fano v. O'Neill*, 806 F.2d 1262, 1265 (5th Cir. 1987); *S.E.C. v. Blavin*, 760 F.2d 706, 712 (6th Cir. 1985); *Azar v. U.S. Postal Service*, 777 F.2d 1265, 1269 (7th Cir. 1985); *United States v. Manning*, 787 F.2d 431, 436 (8th Cir. 1986); *Watkins v. U.S. Army*, 875 F.2d 699, 706 (9th Cir. 1989) (*en banc*); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416

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commentators assume that this Court's observations and the lower courts' interpretations have effectively rendered estoppel against the government an established principle.[6]

B. The Court has applied estoppel against the government on two occasions.

In addition to consistently suggesting that estoppel against the government is possible, this Court has at least twice so held. See *Community Health Services*, 467 U.S. at 60 n.12. The first of those was *Moser v. United States*, 341 U.S. 41 (1951), which is structurally identical to the instant case and therefore calls for a similar result.[7]

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(10th Cir. 1984); *Eagle v. Sullivan*, 877 F.2d 908, 910 (11th Cir. 1989); *USA Petroleum Corp. v. United States*, 821 F.2d 622, 625 (Fed.Cir. 1987).

[6] K. Davis, *Administrative Law of the Seventies*, at 404 (1976) [hereinafter *Davis 1976*]; Comment, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. Chi. L. Rev. 1026, 1028 (1986) [hereinafter *Restrictive Rule*]; Note, *Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule*, 55 Fordham L. Rev. 707, 712 (1987) [hereinafter *Proprietary Function*]; Note, *Estopping the Federal Government: Still Waiting for the Right Case*, 53 Geo. Wash. L. Rev. 191, 191-192 (1984-1985) [hereinafter *Still Waiting*].

[7] OPM argues that *Moser* was not an estoppel case, but an instance of statutory construction. Gov't Br. 40. And this Court framed its analysis as an absence of a knowing waiver of rights. 341 U.S. at 47. But the decision employs estoppel-like language – "led to believe", "justifiable reliance", "misleading circumstances", "elementary fairness" (*id.* at 46, 47) – and courts and commentators generally consider it an application of estoppel principles. See, *e.g.*, *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982); *Davis 1983* at 7-9; Note, *Equitable*

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Moser, a neutral alien, signed a form to obtain an exemption from the draft, apparently on the assumption that it would not affect his right to citizenship. *Id.* at 45. Contrary to what he had been led to believe, however, the statute permitted "a choice of exemption and no citizenship, or no exemption and citizenship." *Id.* at 46.

The only difference between *Moser* and this case is the nature of the right at issue. That it was a right to citizenship in one instance, and the right to a pension in the other, is irrelevant for purposes of this analysis. In both situations, the claimant possessed a vested entitlement, and reliance on the specific direction of the responsible government agency induced the individual to take action which, under the statute, deprived him of his vested right. This Court expressly recognized the significance of that point when it observed that *Community Health Services* involved an entirely different circumstance: "[T]his is not a case in which the respondent has lost any legal right, either vested or contingent . . . ." 467 U.S. at 61-62 (footnote omitted). The trailing footnote emphasized the distinction: "This case is, therefore, plainly distinguishable from *Moser* . . . ." *Id.* at 62 n.14.

Moser and Richmond both sought information from the proper source in an effort to determine what steps they could take while preserving an existing vested right. Both were given information which then led them to take the very actions – requesting a deferment and performing additional work – that deprived them of the entitlement which they had set out to protect. Moser's "justifiable reliance" (341 U.S. at 46) is indistinguishable from Richmond's.

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Estoppel of the Government, 47 Brooklyn L. Rev. 423, 435, 440 & n.71 (1981). Furthermore, there is no suggestion that the Court was engaged in statutory construction; its analysis was entirely equitable. The interpretation which OPM purports to infer from the Court's reasoning is far removed from the actual language of the statute.

That the Court did not term its action in *Moser* an estoppel is merely a semantical point, for it is not the terminology, but the underlying principle, that is significant. As Justice Cardozo noted in considering the appropriate nomenclature in another estoppel case:

> The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his inequity or take advantage of his own wrong.

Stearns Co. v. United States, 291 U.S. 54, 61-62 (1934) (citation omitted). Designating the crucial event in *Moser* waiver of a right without full disclosure does not alter its applicability to this situation. Mr. Richmond was also deprived of an intelligent waiver when he was informed that he could engage in work without affecting his vested annuity. Regardless of the terminology, *Moser* and *Richmond* describe structurally identical scenarios, and, having determined that Moser could not be bound because of governmental misconduct, the Court should treat Richmond no differently. As Professor Davis has observed about *Moser*: "[T]he main idea in it is not superseded." *Davis 1983* at 15.[8]

In the second case, *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674 (1973) ("*PICCO*"), the Court determined that when the government, by long-standing construction of a statute, had "affirmatively misled" a corporation into believing that

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[8] *Moser* is significant for another reason. The four remaining members of the majority in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), including the author, Justice Frankfurter, agreed with the *Moser* analysis. Courts and commentators view *Moser* to have overruled *Merrill*, or at least to have substantially undermined it. See, *e.g.*, *United States v. Lazy FC Ranch*, 481 F.2d 985, 988-989 (9th Cir. 1973); *Corniel-Rodriquez v. United States*, 532 F.2d at 305 n.15; *Davis 1983* at 7.

its actions were not criminal, "traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution." That holding is also supportive of Mr. Richmond's position.

In *PICCO*, the corporation followed the written interpretation of the "responsible administrative agency", the function of which "was to guide persons as to the meanings and requirements of the statute." *Ibid*. OPM's printed explanation of § 8337(d) had the same purpose, and was given to Mr. Richmond precisely in response to his request for guidance on the issue. Furthermore, like Mr. Richmond, the company in *PICCO* took action in reliance, only to have the agency belatedly claim that the law was different than the government had portrayed it. For purposes of estoppel analysis, it is not relevant whether the effect of that reliance was criminal prosecution or the loss of a vested right. The key elements are the same regardless of the impact in the particular case.

That the *PICCO* decision rests on equitable estoppel principles is apparent not only from the potential remedy – precluding the government from relying on the actual law – but also from the Court's citation to two law review articles on estoppel and from the discussion as to whether there was reasonable reliance. *Id*. at 674, 675. The suggestion that the government might have "affirmatively misled" the corporation is also consistent with the affirmative misconduct language which this Court has employed in estoppel cases.[9]

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[9] As with *Moser*, OPM attempts to distinguish *PICCO* by claiming that the analysis is based on other grounds, in this instance, due process. Gov't Br. 39-40. Again, however, the language, thrust, references, and intended impact of the decision are all framed in the context of estoppel, not due process. Neither OPM nor the concurring opinion in *Community Health Services*, 467 U.S. at 68, provides any explanation as to why the criminal nature of the proceeding in *PICCO* should preclude an apparent estoppel analysis from being just that.

II. THERE IS NO BASIS FOR NOT ALLOWING ESTOPPEL AGAINST THE GOVERNMENT

A. Sovereign immunity does not bar estopping the government.

1. OPM contends that the principles of sovereign immunity preclude estoppel of the government. Short of an explicit waiver by Congress, OPM argues, this "free-floating remedy for government misconduct" (Gov't Br. 15-16) must be rejected. The argument, however, ignores the history and development of both sovereign immunity and estoppel. The former is not the impregnable fortress which OPM describes, and the reality is and has been for years that, in limited circumstances, the will of Congress is satisfied by allowing courts to employ their equitable powers to correct governmental wrongdoing. Certainly this is the appropriate response when an agency's consistent malfeasance has caused the loss of a vested entitlement.

Estoppel, of course, is a concept of equity, which developed in the English court system. *Payne v. Hook*, 74 U.S. (7 Wall.) 260, 262 (1869). These equitable powers were then conferred on our federal courts by the Constitution.[10] *Noonan v. Braley*, 67 U.S. (2 Black) 278, 281 (1863). It is thus a doctrine "of several hundred years of history." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The nature of these equitable powers allows the courts to balance competing factors in order to obtain a just result:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . . .

Ibid.

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[10] "The judicial Power shall extend to all Cases, in Law and Equity . . . ." U.S. Const. Art. III, § 2.

OPM's absolutist view of sovereign immunity, therefore, must be tempered by the recognition that estoppel, as a creature of equity, authorizes courts to exercise considerable power in attaining the proper balance. As one commentator has noted in appraising equity's broad remedial reach:

> The power of the federal courts to grant equitable relief to protect claimants from unconstitutional conduct has always been assumed, and the federal courts have been willing to go to great lengths to make such relief possible. Recent controversies over the Court's authority to issue remedies for constitutional violations have assumed the propriety and importance of anticipatory relief; any debate has concerned damages.

Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 85 n.214 (1981).

By contrast, although the doctrine of sovereign immunity also has its origin in English history, it has not maintained its dominant position. Contrary to OPM's suggestion, sovereign immunity has long been discredited as a definitive bar. Justice Frankfurter offered this repudiation of the suggestion that sovereign immunity is the first and last word on actions against the government:

> Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, . . . it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago, that "it is a wholesome sight to see 'the Crown' sued and answering for its torts."

Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting) (citations omitted). This Court remarked fifty years ago on "the current disfavor of the doctrine of governmental immunity from suit . . . ." *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940). And a commentator has termed sovereign immunity "[p]erhaps the most anachronistic doctrine in Anglo-American public law . . . ." Schwartz, *Estoppel and Crown Privilege in English Administrative Law*, 55 Mich. L. Rev. 27 (1956).

Similarly, the notion of an historical basis for sovereign immunity barring estoppel against the government has been soundly discredited. Raoul Berger, in a seminal article on the issue, explained that English law had been mistakenly tapped as the source:

> Governmental immunity from estoppel, it has been held, is an offshoot of sovereign immunity. That claim may draw some comfort from early English dicta, but such dicta do not represent English law. An English commentator has labelled the notion that the Crown is not bound by estoppel "a prerogative fallacy." In the United States the doctrine of sovereign immunity is in current disfavor and offers uneasy support to doctrines that work hardship and injustice.

Berger, *Estoppel Against the Government*, 21 U. Chi. L. Rev. 680, 683 (1954) (footnotes omitted) [hereinafter *Berger*]. Continuing the assault on the alleged roots of the relationship between estoppel and sovereign immunity, the Ninth Circuit reported that one commentator could find

> no trace of a decision holding that the King is not bound by equitable estoppel . . . . As one English court said . . . : "The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded."

United States v. Georgia-Pacific Company, 421 F.2d 92, 99 n.12 (9th Cir. 1970) (citations omitted).

Accordingly, as the courts have recognized that sovereign immunity does not rest on the version of English law previously portrayed, and have also recognized the importance of equitable remedies to protect the public from unjust governmental actions, there has been an increasing tendency not to accede to the axiomatic notion that sovereign immunity bars estoppel of the government. Rather, courts have accepted that the government, no less than private parties, must be accountable:

> [I]t is hardly in the public's interest for the Government to deal dishonestly or in an unconscientious manner. This is especially imperative in a time when few individuals and corporations, if any, can escape numerous dealings with the Government and its agents.

Id. at 100.

It is thus the assumption of courts and commentators that the erosion in sovereign immunity has proceeded to the point that it cannot stand as a prohibition against estopping the government.[11] Professor Davis summarizes the development in these words:

> Over nearly two centuries, Supreme Court law has moved unevenly from a rigid refusal in all circumstances to apply equitable estoppel against the government, to the present somewhat uncertain law that the government may be estopped in some circumstances.

Davis 1983 at 3.

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[11] See, *e.g.*, *Portmann v. United States*, 674 F.2d at 1159; Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 554 & n.25 (1979) [hereinafter *Equitable Estoppel*]; *Proprietary Function*, 55 Fordham L. Rev. at 710; *Still Waiting*, 53 Geo. Wash. L. Rev. at 192.

The fact that this Court has repeatedly refused to state what OPM claims is and always has been the law (see Gov't Br. 13-14) is strong evidence that OPM's contentions about the impact of sovereign immunity are dramatically overstated. With the lower courts repeatedly declaring that there can be estoppel against the government, and with the government repeatedly asking for a resolution of the issue, it is instructive that this Court has consistently declined to resolve the matter as requested – thus effectively permitting the government to remain susceptible to estoppel.

Any doubt as to the limited effect of sovereign immunity in this context is resolved by *Moser*. There, "as a matter of law, the statute imposed a valid condition on the claim of a neutral alien for exemption [from the draft] . . . ." 341 U.S. at 46. That is, the law prohibited anyone who had chosen a draft deferment from asserting the right to citizenship. Moser did exactly that. Yet this Court's decision to ignore his choice of exemption, because of "misleading circumstances" (*id.* at 47), had precisely the result which OPM claims is impermissible under the principle of sovereign immunity: it "prohibit[ed] [the government] from enforcing compliance with law." Gov't Br. 15.

The Court has recognized that equitable considerations provide the rationale for awarding benefits not approved by Congress in other contexts as well. Thus, the typical remedy where a statute is found to violate equal protection guarantees is the extension of benefits to the classification disfavored by the statutory scheme. *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979). By extending benefits, a court is ordering a payment which Congress had not authorized; indeed, Congress had expressly decided not to pay benefits in these circumstances. See *id.* at 94-95 (Powell, J., concurring in part and dissenting in part). But there has been no suggestion that sovereign immunity

does not permit this use of the judiciary's equitable authority:

> [W]e would be inclined to consider [this issue] only if the power to order extension were clearly beyond the constitutional competence of a federal district court. This Court's previous decisions, however, which routinely have affirmed District Court judgments ordering extension of federal welfare programs, suggest strongly that no such remedial incapacity exists.

Id. at 91.[12]

If sovereign immunity is not a sufficient bulwark to preclude a court from ordering relief to a class of people for whom Congress had explicitly determined not to provide benefits, then it surely cannot bar a court's effort to remedy governmental injustice on the far more limited scale implicated by estoppel. This is especially true here, where the court is merely enforcing conformity with the law which, according to the government, was still in existence. The risk of "infringing legislative prerogatives" (*id.* at 92) is considerably less in this situation than in extending benefits to a class for which Congress had expressly refused to authorize payment.

OPM's expansive view of the impact of sovereign immunity on this area sweeps too broadly. Its inflexible and over-simplified assumption that estoppel principles must bow to the allegedly unyielding dictates of sovereign immunity demonstrates an unrealistic perception of how these doctrines have developed and the nature of

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[12] See also Miller, *Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of* Heckler v. Mathews, 20 Harv. C. R. – C. L. L. Rev. 79, 110 n.144 (1985) (sovereign immunity does not bar extending benefits to disfavored classification because benefits flow from equitable remedy of injunction not from damage award).

their interplay. Sovereign immunity does not lead inexorably to a complete prohibition of estoppel against the government. The better view recognizes the intrinsic tensions between estoppel and sovereign immunity, and resolves them by holding "that the Government may not be estopped on the same terms as any other litigant." *Community Health Services*, 467 U.S. at 60 (footnote omitted).[13]

2. OPM's rigid perception of sovereign immunity leads it to conclude that a court may only apply estoppel where Congress has expressly so consented. Gov't Br. 15-19. As has been explained, however, the courts' capacity to estop the government derives not from Congress but from the authority conferred on the judiciary by the Constitution. In this context, the judiciary is not ordering the extension of unauthorized rights; it is employing its equitable powers to prohibit the government from applying a new law when it has previously asserted that the old law was applicable:

> The estoppel is no more than a procedural device that prevents the government from asserting a defense against a plaintiff's statutorily based claim; thus, there is no need for

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[13] OPM's reliance on *INS v. Pangilinan*, 108 S.Ct. 2210, 2216 (1988) (see Gov't Br. 14), is misplaced. The language quoted from that decision is dictum, for the Court's "[m]ore fundamental[ ]" holding was that Congress had not conferred on the district courts any equitable power in that situation, but had directed them solely to carry out "a specific function." *Ibid.* The lower court in *Pangilinan* was intent on using its presumed equity powers to craft a remedy where none could exist. By contrast, in this instance the court below was simply applying traditional estoppel principles to enforce OPM's stated version of the law. To ascribe to *Pangilinan* the controlling effect suggested by OPM would put it in direct conflict with *Moser* and *PICCO*.

> sovereign authorization. Moreover, the plaintiff is claiming a benefit for which Congress has already allocated resources.

Restrictive Rule, 53 U. Chi. L. Rev. at 1042 (footnote omitted).

Accordingly, OPM's contention that 5 U.S.C. § 7703(c)(1) does not provide a waiver of immunity is irrelevant. Applying estoppel to the government is not an effort to force Congress to pay unobligated benefits; it is instead "an equitable doctrine invoked to avoid injustice in particular cases." *Community Health Services*, 467 U.S. at 59. A court which determines "to protect reliance on a misrepresentation by treating the misrepresentation as true" (Gov't Br. 15) is not countering the will of Congress, but is holding the government to its word.[14]

Similarly, OPM's use of the Federal Tort Claims Act's exclusion of misrepresentation allegedly to demonstrate "that Congress has not conferred general authority upon the courts to estop the government" (Gov't Br. 17) is far removed from the issues of this case. Unlike the tort of misrepresentation, "estoppel has usually been treated as a procedural mechanism that merely precludes a party from asserting a defense, and has not been seen as an independent cause of action that would require the blessing of Congress." *Restrictive Rule* at 1039. This approach is especially appropriate in instances such as this (unlike situations such as *Merrill* and *Community Health Services*),

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[14] In any event, OPM's argument about § 7703(c)(1) is, at best, highly questionable. See Gov't Br. 16. To give explicit written directions in response to a discrete question, on which the asking party reasonably relies to his detriment, would appear to be precisely what the review provision contemplates as the basis for relief: "agency action . . . found to be arbitrary, capricious, [or] an abuse of discretion . . . ."

where the individual "would have qualified for a statutory benefit had the government agent acted properly." *Restrictive Rule* at 1041.

Even if Congress' action with respect to the FTCA could conceivably be relevant, OPM's attempt to infer legislative significance from the exclusion of misrepresentation is too attenuated to be credited. Congress was considering a broad waiver of sovereign immunity with the FTCA, and its decision not to include the tort of misrepresentation offers no insight on the issue of this case. Estoppel and misrepresentation are not the opposite sides of the same coin described by OPM.

B. Estopping the government does not violate separation of powers principles.

OPM argues at great length (Gov't Br. 20-34) that the separation of powers doctrine also prevents estoppel of the government. Its position is essentially a repetition of its sovereign immunity argument, however, for the contention reduces itself to the notion that estopping the government amounts to "an order that the Executive act in violation of the law." Gov't Br. 22.

1. Stripped of its discussion of situations where Congress has expressly legislated in favor of reliance interests (Gov't Br. 24-34), the argument rests solely on the unsupported and unrealistic premise that the three branches of government operate so independently that *any* interference by one branch with the affairs of another violates separation of powers principles. Under this theory, estopping the government effects a dual violation: the actions and words of an executive agency take precedence over the will of Congress, and the judiciary's very order of estoppel is itself an intrusion on the legislative prerogative. Gov't Br. 20-24.

Although OPM cites numerous decisions purportedly supporting this contention, these cases stand only for the unremarkable proposition that estoppel was inappropriate in the given circumstances.[15] This Court has never suggested that the minimal intrusion occasioned by estopping the government is in conflict with principles of separation of powers; *Moser* and *PICCO* demonstrate just the opposite. The Court has consistently emphasized that the separation of powers doctrine is not the simplistic concept embraced by OPM:

> [T]he Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct . . . . Madison recognized that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which "would preclude the establishment of a Nation capable of governing itself effectively."

Mistretta v. United States, 109 S.Ct. 647, 659 (1989) (citations omitted).

As a consequence of this overriding purpose, the Court has adopted a "flexible understanding". *Ibid.*; see also *Nixon v. Administrator of General Services*, 433 U.S. 425, 442-443 (1977); *Berger*, 21 U. Chi. L. Rev. at 707 ("judicial trend toward realism in applying the separation of powers"). Yet OPM would have the Court invoke a narrow and unyielding approach under which the minor inroad occasioned by estoppel would violate the doctrine:

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[15] For instance, OPM claims that "[e]stoppel of the government thus confers *pro tanto* legislative status on government employees, and effectively overrides Congress's mandates. See *Merrill*, 332 U.S. at 383." Gov't Br. 20. But nothing in the *Merrill* decision, at that page or at any other page, states that separation of powers principles provide the doctrinal underpinning for the holding.

"[S]uch a rigid separation of powers analysis contrasts sharply with the more realistic and flexible judicial approach to separation of powers problems in other areas such as legislative delegation." *Portmann v. United States*, 674 F.2d at 1159. The corrective effect of estoppel carries out the "duty of interdependence"; to equate the judiciary's limited remedial action with the "encroachment and aggrandizement that has animated our separation-of-powers jurisprudence" (*Mistretta*, 109 S.Ct. at 659) is to miss the point of that doctrine altogether.

OPM's approach allows no flexibility. It opines that to permit an estoppel against the government is a *per se* elevation of the executive and the judiciary to a position above the legislature. But such an analysis ignores reality. Forcing compliance with what the executive agency incorrectly advised in an individual case does not cause, lead to, or even imply "encroachment and aggrandizement"; it simply seeks to correct a wrong for which the government, as a whole, is responsible. It does not, by any stretch of the imagination, "involve an attempt by [one branch] to increase its own powers at the expense of [another branch]." *Morrison v. Olson*, 108 S.Ct. 2597, 2620 (1988).[16]

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[16] Even OPM does not suggest that permitting estoppel of the government would lead to wholesale efforts by executive employees to thwart the will of Congress. Only such a broad-based effort could conceivably work the kind of intrusion which would threaten the separation of powers. By definition, however, estoppel is "invoked to avoid injustice in particular cases," *Community Health Services*, 467 U.S. at 59, and its application on a case-by-case basis cannot plausibly result in a repudiation of legislative privileges by the executive or the judiciary.

Indeed, as several commentators have noted, estopping the government operates not to subvert the separation of powers, but to uphold it by effecting the greater legislative purpose.[17] As one explains:

> [A] no estoppel rule permits the executive branch to undermine legislative programs – and thus the separation of powers – simply by intentionally or unintentionally misinforming the public. Thus, the application of estoppel . . . can be understood as preserving the separation of powers by ensuring that executive officials cannot block benefits from going to those whom Congress intended to have them.

Restrictive Rule, 53 U. Chi. L. Rev. at 1043.

Thus, it is precisely in those rare circumstances where estopping the government is appropriate because of affirmative misconduct that estoppel operates most effectively to uphold the separation of powers. When the agency's misrepresentation is intentional or reckless, a no-estoppel rule would have the effect of allowing the executive to defeat the will of Congress. *That* is the kind of encroachment which the separation of powers doctrine is intended to prevent. Estopping the government avoids that intentional intrusion on the legislature's prerogatives. See *id.* at 1045.

2. OPM's detailed explanation of how Congress periodically, through public and private bills, recognizes specific reliance interests proves only that Congress has decided, in a variety of circumstances and for a variety of reasons, to supplement the judiciary's remedial powers. It

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[17] See *Restrictive Rule*, 53 U. Chi. L. Rev. at 1043-1045; *Equitable Estoppel*, 79 Colum. L. Rev. at 566; *Still Waiting*, 53 Geo. Wash. L. Rev. at 202; Note, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?*, 56 St. John's L. Rev. 114, 135 (1981) [hereinafter *Governmental Immunity*].

is a recognition that estoppel's limitations – which are not in dispute – will permit wrongs to go unremedied in the absence of intervention by Congress.

For instance, the statutes allowing waiver of overpayment recoveries in federal benefit programs (see Gov't Br. 25) recognize reliance interests which estoppel could not remedy because, as in *Community Health Services*, 467 U.S. at 62 & n.14, the recipient had no vested right to those benefits. Similarly, the recent legislation responding to the type of situation described in *Hansen* (see Gov't Br. 36 n.37)[18] is a perfect illustration of Congress providing a remedy which, for the reasons outlined in *Hansen*, the judiciary is powerless to confer.

No one contends that estoppel provides an all-encompassing mechanism for correcting the mistakes of the executive; as the decisions demonstrate, there are many situations where estoppel against the government is impermissible. Accordingly, additional and specific procedures authorized by Congress are appropriate complements to the traditional remedies. At the same time, however, the fact that Congress takes specific action in some instances does not imply that legislation is the exclusive means for resolving incidents of injustice. Accord, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396-397 (1971).

C. Estoppel of the government serves the public interest.

Despite the fact that estoppel is intended "to avoid injustice," *Community Health Services*, 467 U.S. at 59, and that "the dictates of both morals and justice" support its

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[18] Pub. L. No. 101-239, § 10302, 103 Stat. ___ (1989).

application, *Georgia-Pacific Company*, 421 F.2d at 103,[19] OPM also argues that estopping the government runs contrary to the public interest. Its premise is that allowing estoppel of the government would overwhelm the government's ability to carry out its duties due to the "enormous potential liability" and the "invitation to fraud" which it would engender. Gov't Br. 34, 35. These contentions are without factual support; quite to the contrary, estopping the government can only be in the public interest:

> Confidence in the fairness of the government cements our social institutions. No pinch-penny enrichment of the government can compensate for an impairment of that confidence, for the affront to morals and justice involved is the repudiation of a governmental representation.

Berger, 21 U. Chi. L. Rev. at 707.

Allowing the government to be estopped does not have the dire consequences predicted by OPM. Proving the traditional standards for estoppel presents a difficult hurdle for most potential claimants. And the additional requirement of affirmative misconduct, which eliminates claims based on simple negligence, drastically cuts the number who can legitimately make the argument. See *Equitable Estoppel*, 79 Colum. L. Rev. at 560; *Restrictive Rule*, 53 U. Chi. L. Rev. at 1046-1047. Because the courts have assumed that estoppel against the government is permitted, it is not a question of mere speculation as to how estoppel might affect the government; there is considerable evidence that the factors necessary to prove an

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[19] See also, *e.g.*, *Community Health Services*, 467 U.S. at 61 & n.13; *United States v. Wharton*, 514 F.2d 406, 412-413 (9th Cir. 1975); accord, *United States v. Morgan*, 307 U.S. 183, 194 (1939) (equating decision to grant equitable relief with "the public interest involved").

estoppel are sufficiently "unusual and extreme" (Pet. App. 14a) that estopping the government is a rare event.[20]

OPM's misunderstanding on this point is caused by its confusion as to the crucial facts of this case and the general principles for applying estoppel. Estoppel is not appropriate in run-of-the-mill situations, such as when individuals have casual conversations with government employees or "simply take[ ] home . . . circulars that turn [ ] out to contain out-of-date information." Gov't Br. 35. The information on which Mr. Richmond relied, however, was of a qualitatively different caliber. It was in writing; it was prepared by OPM officials in Washington precisely in order to explain the operation of the law on post-retirement work; it was given to him in direct response to a specific question on the issue; and it had not been corrected despite the passage of several years. It was not a mere pamphlet lying around the office which an annuitant mistakenly stumbled upon; it was the very item to which both the government and the retiree were directing their attention – and it was blatantly in error.

Estopping the government in the rare case such as this does not take advantage of the government's inability "to exercise complete control over every one of its millions of employees and agents." Gov't Br. 34. This is not an instance where an individual employee casually gave out incorrect information, or where there is any dispute as to what information was provided. Here, the

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[20] The relevant portion of the 1988 "cumulative annual pocket part" to 35 *Federal Practice Digest 3d* ("key number" 62.2(4)), roughly covering the years 1984 through 1988, discloses that, of 62 reported estoppel decisions rendered by the appellate courts in that period, the government was estopped in only one.

agency *itself* was responsible for dispensing prepared written information which could have been corrected at any time.

Furthermore, susceptibility to estoppel will not require OPM to police its many employees in order to prevent mistakes from occurring; instead, it will encourage the agency to ensure that it does not provide the wrong information as a matter of course. Uncontroverted incidences are the most appropriate for estoppel (see *Davis 1983* at 11, 20), and agency-wide distribution of printed misinformation is a particularly egregious example of this genre. By contrast, simple oral misstatements generally do not result in estoppel. See, *e.g.*, *Rider v. U.S. Postal Service*, 862 F.2d 239, 241 (9th Cir. 1988), cert. denied, 109 S.Ct. 2430 (1989).

Similarly, OPM's claim that allowing estoppel of the government would encourage fraud (Gov't Br. 35) is more overstatement: "[T]he amount of 'improper collusion' by federal officers has been remarkably small." *Berger*, 21 U. Chi. L. Rev. at 684. Moreover, the limitations on the availability of estoppel, especially that the misinformation must generally be in writing, render the chances for fraud in this context considerably few. See *Community Health Services*, 467 U.S. at 65.

Even if there is some remote possibility of collusion to obtain the advantages of an estoppel, prohibiting estoppel is not the appropriate response. In the limited form in which it is applicable to the government, estoppel has significant positive policy consequences: it does justice to the injured individual; it ensures "some minimum standard of decency, honor, and reliability" for the public (*Community Health Services*, 467 U.S. at 61); and it provides an incentive for agencies to correct or prevent major misrepresentations. The minimal fraud which it might encourage is better remedied by application of

criminal sanctions than by negating the doctrine altogether. *Restrictive Rule*, 53 U. Chi. L. Rev. at 1035; *Berger*, 21 U. Chi. L. Rev. at 684.

OPM's public interest argument is, in the end, contradicted by the history of estoppel. The agency's speculation as to what might happen "[i]f estoppel were permitted" (Gov't Br. 34) is undercut by the fact that for years the Courts of Appeals have interpreted this Court's decisions to permit estoppel. See, *e.g.*, *Davis 1976* at 399; *Proprietary Function*, 55 Fordham L. Rev. at 712. Applying one variant or another of the exacting formulation indicated by this Court's opinions, those courts have estopped the government only in very limited circumstances. As a matter of fact, therefore, none of OPM's exaggerated fears have come true, so that there is no public interest in prohibiting estoppel of the government. To the contrary, the public interest is only served by allowing the possibility of estopping the government.

III. IT WAS APPROPRIATE TO ESTOP THE GOVERNMENT IN THIS INSTANCE

A. This case has all the elements which support estoppel of the government.

Through the years, this Court has cited a variety of reasons as to why, in a given situation, estoppel of the government was improper. In this case, however, all the relevant factors support estoppel.

First, unlike the claimants in such cases as *Community Health Services* and *Hansen*, the misconduct here caused the claimant to lose a vested right. Far from being lulled into accepting funds to which he was not entitled (see, *e.g.*, *Community Health Services*, 467 U.S. at 61), Mr. Richmond was induced to take action which deprived him of his existing entitlement. This is precisely the basis on which the Court distinguished *Moser* from *Community*

Health Services: loss of a vested right. 467 U.S. at 62 & n.14.

Furthermore, again unlike in *Hansen*, 450 U.S. at 789, and *Community Health Services*, 467 U.S. at 62 & n.15, after Mr. Richmond had acted in reliance on the government, the consequences could never be corrected, another reason favoring estoppel. See, *e.g.*, *Proprietary Function*, 55 Fordham L. Rev. at 715. His acceptance of the additional work deprived him of his annuity; he could not alter the outcome simply by returning the money or filing an application. The claimants in *Hansen* and *Community Health Services* relied passively by doing nothing to affect an eligibility which they had never possessed in the first place, but Mr. Richmond took the very action which deprived him of existing eligibility. Again, this is structurally the same as the affirmative step taken in *Moser*, where the act of signing the request for deferment deprived Moser of his entitlement to citizenship status.

Also, as previously noted, the reliance in this case was on a written instrument which had been prepared and disseminated by the responsible agency.[21] It was provided in response to a discrete inquiry about the very concern which ultimately was used against him. This situation did not involve a casual remark which the claimant might have misinterpreted, see, *e.g.*, *Montana v. Kennedy*, 366 U.S. at 314, nor is there any indication that Mr. Richmond may have confused or misled the government employees. See, *e.g.*, *Hansen*, 450 U.S. at 789. It is

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[21] It was not generated by a local employee who simply made a mistake in compiling the information. See, *e.g.*, *Morgan v. Heckler*, 779 F.2d at 545. The writing at issue was an official agency document which purported to state the law that OPM administers.

precisely this kind of written response which OPM should have carefully considered, for "[w]ritten advice . . . requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism, and reexamination." *Community Health Services*, 467 U.S. at 65. Even minimal reflection should have led to a correction within some reasonable period after the law was changed.

In addition, Mr. Richmond was seeking information from the proper source, his former employer, which had a department whose precise purpose was to assist retirees and which had previously accepted his retirement application. His question was a simple one, requiring no interpretation or analysis. In response he received a straightforward, unambiguous statement, the "authoritative interpretation" of the responsible agency itself. See *Berger*, 21 U. Chi. L. Rev. at 691. This situation is in direct contrast to that in *Community Health Services*, where an institution familiar with the bureaucracy of federal funding relied on the interpretation of complex federal regulations provided by a private company, without attempting to obtain an opinion from the government itself. See 467 U.S. at 64-65.

Finally, the misconduct in this case occurred when the government was acting in its proprietary, rather than sovereign, capacity. It was not dispensing welfare benefits, or in any other way acting in a manner peculiar to a government. Mr. Richmond was employed as a welder; when he became disabled, he sought a retirement annuity from his employer. This relationship is exactly as it would have been if Mr. Richmond had worked for a private company: upon retiring, he, like someone in private

industry, received a pension as deferred compensation for his services.[22]

Some courts and commentators contend that estoppel against the government is especially appropriate when the government is acting in a proprietary capacity.[23] As Professor Davis succinctly puts it: "[I]f law has been carefully worked out to require an insurance company to be fair to the insured, why should Uncle Sam in the insurance business be exempt from that law?" *Davis 1983* at 7. Accordingly, the proprietary nature of the government's role vis-a-vis Mr. Richmond also favors application of estoppel.

B. OPM cannot demonstrate that Mr. Richmond's reliance was not reasonable.

OPM's only contention that Mr. Richmond did not meet the traditional standards for estoppel is that his reliance was not reasonable. The agency thus accepts that

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[22] See *Davis v. Michigan Dept. of Treasury*, 109 S.Ct. 1500, 1504 (1989) (civil service retirement benefits as deferred compensation); *Inland Steel Co. v. NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949) (private pension benefits as wages).

[23] See, *e.g.*, *Portmann*, 674 F.2d at 1161-1162; *FDIC v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984); *Proprietary Function*, 55 Fordham L. Rev. at 708-709. It has been suggested that *Merrill* repudiated this distinction, as the Court refused to estop the government on an insurance matter (see, *e.g.*, *Phelps v. FEMA*, 785 F.2d 13, 17 (1st Cir. 1986)), but there is language in *Merrill* suggesting that the government was not there acting in a proprietary capacity. See 332 U.S. at 383 n.1. In any event, *Moser* stands clearly for the proposition that the government may be estopped in any situation, as it involved the particularly sovereign capacity of conferring citizenship. Accord, *United States v. Lazy FC Ranch*, 481 F.2d at 989.

the other factors are satisfied. See *Community Health Services*, 467 U.S. at 59 & n.10.[24] Indeed, except for a legal fiction, OPM concedes that the reasonableness element is also met.

The legal fiction is that citizens are presumed to know the law; accordingly, "reliance on the words of a government employee that contradict the terms of a published statute or regulation can never be 'reasonable' . . . ." Gov't Br. 44. Literal application of this proposition, however, would have the effect of preventing the government from ever being estopped when it gives out incorrect information about the law. *Azar v. U.S. Postal Service*, 777 F.2d at 1270. Since "the proper office of legal fictions is to prevent, rather than to create, injustices", *United States v. Markgraf*, 736 F.2d 1179, 1187 (7th Cir. 1984) (Posner, J., dissenting from denial of rehearing *en banc*), cert. dismissed, 469 U.S. 1199 (1985), this is a peculiar result for a doctrine intended to remedy unfairness.

Moreover, literal employment of this fiction would have a staggering impact on governmental operations. Since answers from the government could *never* be trusted, individuals would be forced to retain lawyers to obtain the most basic information. Even Social Security recipients would be advised to refrain from seeking assistance from the Social Security Administration, as the responses would be legally meaningless. A legal fiction with this impact on the relationship between the government and its citizens can hardly be in the public interest.

It is true, however, that the *Merrill* majority employed this fiction in an exacting manner, for it refused to estop a federal agency on the ground that

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[24] OPM no longer contends that his reliance was not detrimental. See Pet. 14-15.

farmers should have read and understood the Federal Register. 332 U.S. at 385. But this position has not been followed through the years.[25]

Moser directly repudiates it. Not only did this Court not impute knowledge of the law to Moser, but the very form which he signed included a footnote quoting the statutory prohibition against citizenship for those who sought exemption from the draft. See 341 U.S. at 44, 46. Even with easy access to the law itself, Moser was not presumed to have knowledge of it. See *Davis 1983* at 9.

In addition to this implicit contradiction of *Merrill*, *Moser* is also significant because the Court there emphasized the circumstances under which the misinformation was provided. Rejecting the relevance of the fact that there was information which arguably could have alerted Moser, the Court stated: "[T]hese are minor distractions in a total setting which understandably lulled *this* petitioner into misconception of the legal consequences of applying for exemption." *Id.* at 46 (emphasis in original); see also *id.* at 47 ("[c]onsidering all the circumstances of the case . . . ."). In short, the crucial determinant is not a pretense that every individual possesses an omniscient

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[25] Justice Jackson's rejoinder in dissent emphasized the irrationality of such a position:

> [I]t is an absurdity to hold that every farmer who insures his crop knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops.

Merrill, 332 U.S. at 387 (Jackson, J., dissenting).

knowledge of the laws, but, rather, evaluation of all relevant factors in a given case to determine what degree of legal sophistication was reasonable and therefore whether reliance was reasonable. This approach is consistent with the overall premise of estoppel, "a hallmark of [which] is its flexible application . . . ." *Community Health Services*, 467 U.S. at 59; accord, *Equitable Estoppel*, 79 Colum. L. Rev. at 564; *Still Waiting*, 53 Geo. Wash. L. Rev. at 204-205.

PICCO is similar. There, despite the fact that the statute prohibited the very conduct carried out by the corporation, this Court allowed the claimant to show that its actions "were made in good-faith belief that they were permissible under law." 411 U.S. at 673. In short, the law itself was of less importance than what the company had been led to believe was the law. The Court determined that the information on which the company relied had the "designed purpose . . . to guide persons as to the meaning and requirements of the statute," *id.* at 674, which is precisely what the FPM Letter in this instance was intended to do.

Furthermore, *PICCO* involved a large and presumably sophisticated for-profit corporation, conversant with federal bureaucracies and laws and with access to experienced attorneys. In light of these factors, the Court's decision to elevate the agency's mistaken explanation of the law over the law itself gives a strong message that, as in *Moser*, all the relevant circumstances must be considered.

Even the language in *Community Health Services* from which OPM derives great import (see Gov't Br. 44, 45) must be tempered by a recognition that this Court did not reject the claim of estoppel because the company was presumed to know the law. Rather, the Court looked at

the considerations relevant to *this* claimant and *this* instance of misinformation: "Nor was the advice given under circumstances that should have induced respondent's reliance." 467 U.S. at 64. Thus, it was relevant to the question of reasonableness that the company was a recipient of public funds, that it was familiar with fiscal intermediaries, that it knew the intermediary was merely a "conduit [which] could not resolve policy questions," and that it failed to seek resolution from the government agency itself. *Id.* at 64-65. These factors led the Court to conclude that this was "not the kind of reasonable reliance that would even give rise to an estoppel against a private party." *Id.* at 66.

Community Health Services, therefore, does not stand for the proposition that all legal knowledge is presumed and therefore reliance on contrary information is always unreasonable. Rather, like *Moser* and *PICCO*, it acknowledges that each claimant and each situation require a separate analysis. Some degree of presumed knowledge may be acceptable, but it will have a different significance in each case – with the different circumstances of each case determining its relative importance.

Accordingly, the strict holding in *Merrill* has generally been rejected in favor of a flexible approach which recognizes different levels of experience with governmental processes and thereby serves the equitable purposes of estoppel. See *Equitable Estoppel*, 79 Colum. L. Rev. at 564-565; *Governmental Immunity*, 56 St. John's L. Rev. at 140-141. Assuming a reasonable knowledge of the law places some burden on the claimant to attempt to ascertain, as dictated by the circumstances, what the law is, but does not demand an unrealistic knowledge.

This is precisely the approach of the court below, which, after reviewing these authorities, determined that

"the most crucial consideration is the objective reasonableness of the reliance. *Community Health Services*, 467 U.S. at 64, 65." Pet. App. 12a. Recognizing that Mr. Richmond is not comparable to sophisticated institutions which have attorneys and which deal regularly with government bureaucracies, the majority took a commonsense view of his actions. Pet. App. 13a. He went to the office which had previously assisted him with issues regarding his retirement; he met with the people whose job it was to handle retirement issues; he asked specific questions about the effect of additional work on his annuity; and, in response, he was given a printed, clear-cut explanation prepared by the administrator of the retirement program. Unlike the events in *Community Health Services*, there was not one step in this process which should have put him on notice that the information was sufficiently suspect to warrant taking additional action. See 467 U.S. at 65-66.[26]

Mr. Richmond's actions in obtaining information were reasonable, and it was reasonable for him to rely on that information. OPM's extremist view of presumed

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[26] Since Mr. Richmond did attempt to enlighten himself about the relevant law, it would be especially ironic if his reliance on the information received were the basis for the loss of his annuity. In the case of a retiree who, in contrast, made no inquiries into the post-retirement work rules, the Merit Systems Protection Board has held that OPM may have had an affirmative obligation to notify annuitants of the change in the earning capacity rule. *Jones v. OPM*, 37 M.S.P.R. 99, 102 (1988). The individual who acted most responsibly should not be treated more harshly than those who took no action.

knowledge must be rejected if the flexible nature of estoppel is to have any meaning.[27]

C. Affirmative misconduct is an established factor in the estoppel equation, and OPM's actions here rose to that level.

1. Consistent with its view that the government may not be estopped, OPM argues that there is no affirmative misconduct element. Gov't Br. 39-43. For all practical purposes, however, this issue has been resolved, as this Court and the lower courts have repeatedly held to the contrary.

For nearly thirty years, since *Montana v. Kennedy* in 1961, the Court has regularly indicated that only some

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[27] Moreover, refusing to estop the government in this case would implicate procedural due process concerns. Where a change in the law threatens the extinguishment of a vested right, the owner must be given sufficient opportunity to conform his conduct accordingly. *Atkins v. Parker*, 472 U.S. 115, 130-131 & n.34 (1985); *Hodel v. Irving*, 107 S.Ct. 2076, 2092 & n.18 (1987) (Stevens, J., concurring in the judgment). Not only did OPM fail to take the feasible step of notifying the discrete class of disability annuitants about the change in law, see *Texaco, Inc. v. Short*, 454 U.S. 516, 550 (1982) (Brennan, J., dissenting); *Jones v. OPM*, 37 M.S.P.R. at 102, but the information provided on request was incorrect. "[A]n enactment that relies on th[e] presumption of knowledge must evidence some rational accommodation between the interests of the State and fairness to those against whom the law is applied." *Texaco, Inc. v. Short*, 454 U.S. at 544 (Brennan, J., dissenting). Distributing a defective explanation which causes the loss of property rights violates the essence of this accommodation.

level of "misconduct" beyond that implied by the traditional factors will give rise to an estoppel against the government.[28] The lower courts have generally adopted that standard.[29] This additional requirement for estopping the government has the effect of limiting the circumstances in which estoppel will be available and thus restricting the government's liability to only the most egregious situations. *Equitable Estoppel*, 79 Colum. L. Rev. at 560; *Restrictive Rule*, 53 U. Chi. L. Rev. at 1046-1047.

The real issue is the nature of this misconduct, which has been labeled "affirmative" since 1973. See *Hibi*, 414 U.S. at 8. There is consensus that something beyond mere negligence is required, see, *e.g.*, *Morgan*, 779 F.2d at 545; *Fano*, 806 F.2d at 1265, but affirmative misconduct generally does not require a showing of intentional misbehavior. Thus, the Fifth and Second Circuits have found affirmative misconduct in an agency's failure to carry out a required procedure, *id.* at 1266; *Corniel-Rodriquez*, 532 U.S. at 307, and the Ninth Circuit has deemed a pattern and practice of misleading actions to be affirmative misconduct. *Watkins*, 875 F.2d at 707-708.

This view of affirmative misconduct is the most logical. It recognizes that the government cannot be accountable for every instance of negligence. At the same time, it

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[28] *Montana*, 366 U.S. at 314-315; *PICCO*, 411 U.S. at 675; *Hibi*, 414 U.S. at 8; *Hansen*, 450 U.S. at 790; *Miranda*, 459 U.S. at 19.

[29] See, *e.g.*, *Watkins v. U.S. Army*, 875 F.2d at 707; *United States v. Asmar*, 827 F.2d at 912; *Fano v. O'Neill*, 806 F.2d at 1265; *Corniel-Rodriquez v. United States*, 532 U.S. at 307. But see *Azar v. U.S. Postal Service*, 777 F.2d at 1271 (no showing of affirmative misconduct necessary to estop the postal service).

does not require the claimant to prove an intentional effort to deceive. Such a requirement would be so demanding as to preclude success on virtually any claim of estoppel. Rather, a showing of "reckless" behavior should be sufficient to satisfy this standard. See *Restrictive Rule*, 53 U. Chi. L. Rev. at 1044 & n.78; Pet. App. 10a, 14a.

A more detailed definition of affirmative misconduct is neither warranted by this case nor necessary for future analysis. Like estoppel in general, there can be no objective test which easily resolves every situation; "each case must be decided on its own particular facts and circumstances." *Watkins*, 875 F.2d at 707 (citation omitted). The existence of affirmative misconduct should thus depend on balancing a variety of factors, such as who provided the information, in what form, when, to whom, and in response to what kind of inquiry. These and other considerations cannot realistically be incorporated into a single definition. The complexities inherent in a flexible concept such as estoppel preclude establishing narrow guidelines.

2. OPM's contention that there was no affirmative misconduct in this situation is dependent on a misleading description of events. The agency refers to the "misrepresentations made by the Navy employees" and terms the mistakes made here "careless" and mere instances of "negligently pass[ing] on misinformation in writing." Gov't Br. 46-47. The deliberate and false implication is that the misconduct was a typical example of individual employees making the kinds of mundane mistakes which must be condoned as a necessary ingredient of governmental operations.

This situation, however, was not the result of temporary carelessness by low-level government workers, nor does it describe a tolerable degree of wrongdoing. For

that reason, and contrary to OPM's argument (Gov't Br. 46), it is not comparable to *Hansen*. The crucial mistake here was an ongoing failure by the responsible federal agency to correct its main channel of communications with annuitants. For over four years, OPM disseminated, in writing, erroneous legal information. Remedying that would have required a simple rewriting of one sentence of the offending publication, an act which the agency did accomplish on its form notifying annuitants that their earning capacity had been restored. See Pet. App. 25a. The misconduct here went far beyond a few careless casual remarks; it was a persistent failure by the responsible agency itself to supply the correct rule for those needing that information.

Mr. Richmond made the right inquiries to the right people. They responded, in writing, with the official statement of the administering agency – which had maintained a blatantly erroneous position for years. As the court below found, this unexplained and consistent failure is "reckless, at the very least." Pet. App. 10a.

Hansen involved the one-time oral misstatement of a single government employee. This situation differs in every relevant respect. OPM's flagrant and persistent disregard of its obligations to those dependent on it depicts a prototypical instance of why estoppel is "necessary to preserve public confidence in government." *Restrictive Rule*, 53 U. Chi. L. Rev. at 1045.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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No. 88-1943

In the Supreme Court of the United States

OCTOBER TERM, 1989

OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

CHARLES RICHMOND

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1943

OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

CHARLES RICHMOND

ON WRIT OF CERTIORARI
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REPLY BRIEF FOR THE PETITIONER

In our opening brief, we observed (Br. 11-12) that this Court has consistently refused to hold the government estopped from enforcing the public laws, and noted that this case fits easily within those precedents. We then reviewed the fundamental principles and practical considerations that underlie this Court's holdings. First, Congress, acting against the background of the rule precluding such estoppel, has never waived the sovereign immunity of the United States to the assertion of estoppel against it. Gov't Br. 12-19. Second, action by the Executive or the Judicial Branch giving the force of law to a misrepresentation by a government official or agency would contravene the basic separation of powers principle that only Congress can legislate. Gov't Br. 20-34. Third, estoppel of the government would disserve the public interest, fueling litigation and exposing the government to enormous potential liability. Gov't Br. 34-36.

As we have shown (Br. 37-38), these dictates are not affected by the presence or absence of "affirmative misconduct." Rather, recognition of detrimental reliance is warranted only when, as a result of official misconduct, subsequent enforcement of a statute is rendered either unconstitutional or unwarranted on the statute's own terms. The question at that point is no longer one of estoppel, but one of enforcing substantive law. Gov't Br. 39-43. In this case, there is no constitutional obstacle or warrant in the statute itself that would justify refusal to enforce the terms of the statute as written. Gov't Br. 43. Indeed, even if there were occasions on which the government could be estopped, this would not be one of them. The respondent has not demonstrated that his reliance on the misinformation provided him was reasonable, let alone that the conduct of Navy personnel in this case was so egregious as to justify disregard of the applicable law. Gov't Br. 44-47.

The bases of our disagreements with respondent, both as to the principles that prohibit the application of estoppel against the government and as to the meaning of this Court's precedents applying those principles, are fully laid out in our opening brief. We therefore limit our reply to specific areas where we believe the respondent has failed to come to grips with our argument or has made an error that calls for clarification.

1. a. Respondent argues (Br. 22-24) that an "erosion" of the doctrine of sovereign immunity "has proceeded to the point that it cannot stand as a prohibition against estopping the government"; it thus becomes "irrelevant" that Congress has not expressly consented to the application of estoppel (Br. 10-11, 26-28). This assertion is both factually[1] and conceptually inaccurate.

[1] This Court has in recent cases repeatedly confirmed the vitality of the doctrine of sovereign immunity. See *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Testan*, 424 U.S. 392, 399 (1976).

Since the barrier posed by sovereign immunity is jurisdictional, "[c]onsent alone gives jurisdiction to adjudge against a sovereign." *United States* v. *United States Fidelity Co.*, 309 U.S. 506, 514 (1940). "[T]he terms of [that] waiver of sovereign immunity define the extent of the court's jurisdiction." *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986). Thus it will not do to say that a device allowing recovery not otherwise available against the government "deriv[es] from the equitable powers of the juridiciary." Resp. Br. 10-11. Rather, a court can only exercise its equitable powers in cases in which it is vested with jurisdiction, and the source of that jurisdiction must be "affirmative statutory authority." *United States Fidelity Co.*, 309 U.S. at 514. The absence of consent in 5 U.S.C. 7703 to the application of estoppel against the government – an absence that is especially significant in view of the "no estoppel" background against which the statute was written (see Gov't Br. 13-14) – is therefore far from "irrelevant"; it is dispositive. Nor does respondent rebut our point that the lack of congressional consent is underscored by the exclusion of all misrepresentation claims from the scope of the Federal Tort Claims Act.[2]

Finally, respondent errs in claiming (Resp. Br. 25) that the application of estoppel is analogous to this Court's recognition of "equitable considerations" when it acts to remedy violations of the constitutional guarantee of equal

[2] Respondent raises in a footnote (Br. 28 n.14) and for the first time the claim that the review provision of Section 7703(c)(1) prohibits, by its own terms, the government's actions here. That claim is without merit for the reasons stated in our opening brief (at 16).

protection. In the case of a statute held to violate that guarantee, the Court modifies the relief specifically authorized by Congress only so far as necessary to assure the legislation's compatibility with the highest law governing Congress and the courts—the Constitution. The issue in such cases, as this Court has repeatedly made clear, is how best to implement congressional intent in light of the fact that full effectuation of that intent is barred by constitutional mandate. See, *e.g.*, *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984); *Welsh* v. *United States*, 398 U.S. 333, 363-367 (1970) (Harlan, J., concurring in the result).

b. In response to our argument on separation of powers, respondent contends (Br. 29-33) that our position involves the simplistic assertion that there must be a hermetic separation of the three branches. However, we neither make nor need to make any such assertion.

Rather, we argue (Br. 20-24, 26-28) that separation of powers principles are inconsistent with the notion that a misrepresentation by an Executive Branch official should *nullify* the clearly expressed dictates of Congress. Surely this point goes to the core of the constitutional mandate of separation of powers, not to its periphery.[3] Moreover, respondent's argument that this Court should alter its interpretation of sovereign immunity to allow a greater exercise of equitable remedies itself raises separation of powers concerns. Insofar as this Court reshapes fundamental jurisdictional doctrines, it violates the premises upon which Congress has legislated.

[3] Thus, contrary to respondent's contention (Br. 30), this Court has consistently recognized that estoppel cannot be applied to allow the Executive and Judicial branches to override congressional mandates expressed by law. See, *e.g.*, *Dixon* v. *United States*, 381 U.S. 68, 73 (1965); *Snyder* v. *Buck*, 340 U.S. 15, 19 & n.6 (1950); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 290-291 (1902); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 676-677, 679-681, 682-683 (1869); see also *INS* v. *Pangilinan*, 486 U.S. 875, 883-885 (1988) (court cannot exercise equitable powers in violation of congressional commands); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947) (emphasizing that authority of government agents is defined by Congress, or by rule-making power delegated to them by Congress).

Respondent has no answer to the structural evidence we present that Congress, save when it explicitly directs otherwise, has reserved to itself the determination when a waiver of the law is appropriate. The suggestion that the courts have general authority to estop the government some of the time, and that Congress acts when the courts cannot (Resp. Br. 32-33), is misguided. Rather, there is no principled difference between the work done by Congress through private bills, and that urged upon the Court in this instance. As we note below (p. 8, *infra*), estoppel is no more warranted in this case than it was in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); just as in the aftermath of *Hansen* and the lower court cases that followed it,[4] a legislative response would be available here if Congress so desired.

c. Respondent does not reply to our point that even in the presence of "affirmative misconduct," estoppel against the government violates basic jurisdictional and structural principles (see Gov't Br. 37-38). He states (Resp. Br. 35-36, 47) only that under an "affirmative misconduct" test, estoppel would be invoked less often.[5] But respondent's

[4] Section 10302 of the Omnibus Budget Reconciliation Act of 1989 waives statutory application requirements for individuals if they were rendered ineligible for certain benefits because, relying on misinformation from a government official, they failed timely to apply. Pub. L. No. 101-239, 103 Stat. 2481-2482.

[5] Respondent's suggestion (Br. 40) that there be a "proprietary" function prerequisite to estoppel similarly fails to mitigate the severe doctrinal problems inherent in estoppel against the government. Moreover, any such distinction between "proprietary" and "govern-

discussion of affirmative misconduct reveals its difficulties: he acknowledges (Resp. Br. 48) that there can be no "objective test" for affirmative misconduct, and that the myriad of considerations to be weighed "cannot realistically be incorporated into a single definition." These conclusions are underscored by the welter of approaches to "affirmative misconduct" that now exists in the courts of appeals. See Pet. 21-22.

Similarly, respondent does not suggest how the fact that misinformation occurs in writing can serve to ease the severe legal obstacles to estopping the government. Respondent does not even cite or attept to deal with decisions of this Court (such as *United States* v. *Stewart*, 311 U.S. 60 (1940)) refusing to estop the government on the basis of reliance on written misinformation.[6] See Gov't Br. 22-23 & n.20, 45, 46-47. And on the level of administration, any rule distinguishing between oral and written misrepresentations would only be counterproductive in its effect on the government's willingness to commit itself to written advice. In the vast majority of cases, that advice is helpful and should not be discouraged.

2. Beyond the difficulties of demonstrating that estoppel of the government can be reconciled with fundamental principles of sovereign immunity and separation of powers, respondent makes a simpler assertion: this Court, he argues (Br. 17-20), has estopped the government before and, therefore, should do so again. But as Judge Friendly

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mental" functions has been rejected by this Court and others. See *Merrill*, 332 U.S. at 383-384 & n.1; Note, *Estopping the Federal Government: Still Waiting for the Right Case*, 53 Geo. Wash. L. Rev. 191, 196-197 (1985); see generally Pet. 20 n.14.

[6] Indeed, in some of these decisions, and unlike the present case, the party claiming estoppel relied on a written response or representation tailored specifically to it. See, *e.g.*, *Automobile Club* v. *Commissioner*, 353 U.S. 180, 182 (1957); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666 (1869).

aptly put it in replying to a similar claim, this is an instance of "the wish being father to the thought." *Hansen* v. *Harris*, 619 F.2d 942, 950 (2d Cir. 1980) (dissenting), rev'd *sub nom. Schweiker* v. *Hansen*, *supra*.

Respondent founds his argument largely on *Moser* v. *United States*, 341 U.S. 41 (1951). As we have already noted (Br. 40-41), this Court in *Moser* explicitly declined to resolve the issue "on the basis of any estoppel." 341 U.S. at 47; see also *Heckler* v. *Community Health Services*, 467 U.S. 51, 68 (1984) (Rehnquist, J., concurring in the judgment). Not surprisingly, therefore, *Moser* is not the "structurally identical" case respondent claims (Resp. Br. 17) it to be: it differs both in rationale and in the nature of the interest at issue.

With respect to the Court's rationale in *Moser*, we have explained (Br. 40) in our opening brief the basis of our belief that the result—refusing to allow an alien's claim of draft exemption to debar him from seeking American citizenship in the absence of a knowing waiver—was grounded in the statutory scheme.[7] No such contention can be made in this case: no part of the statutory scheme at issue here expressly or implicitly conditions the loss of eligibility for benefits on an intentional waiver. To the contrary, here (as in many comparable cases), eligibility for a particular benefit is to be determined by the application of objective criteria. In this instance, the measure is a fixed percentage of annual earnings.

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[7] The Court's analysis also appears to have been informed by due process considerations, given the references to "elementary fairness" and "entrap[ment]." *Moser* v. *United States*, 341 U.S. 41, 47 (1951); see Gov't Br. 40 n.38. As we have noted (Br. 39-40), this Court's decision in *United States* v. *Pennsylvania Industrial Chemical Corp.* (*PICCO*), 411 U.S. 655 (1973), is similarly based. See, *e.g.*, Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 569 n.112 (1979).

Like their rationales, the statutory interests at stake in *Moser* and this case also differ. Moser had a right to apply for citizenship in the absence of a proper waiver. Respondent, on the other hand, had no right—vested or otherwise—to a disability annuity if he was not eligible to receive it. Thus, his argument (Resp. Br. 10, 18) that the benefit here had "vested" begs the very question at issue—whether he had satisfied the statutory requirements for eligibility.[8]

This case is "structurally similar" not to *Moser* but to *Schweiker* v. *Hansen, supra.* In *Hansen,* the claimant lost *eligibility* for benefits because of reliance on official misinformation, and despite respondent's protestations (Br. 38), Ms. Hansen's decision not to file an application is functionally equivalent to respondent's decision to take on extra work: each was a decision consciously made after an incorrect representation by a government official. And, just as respondent lost his benefits for a six-month period once he earned more than the statutory limit, so too did Ms. Hansen irretrievably lose benefits for every day she did not file.

In sum, the relevant precedents are consistent with the dictates of principle and of policy: the doctrine of estoppel, which evolved as a remedy for application between private parties, cannot be imposed on the legal relation between the government and individuals. As we have argued

[8] Respondent's quotation of a commentator who argues that estoppel serves to "ensur[e] that executive officials cannot block benefits from going to those whom Congress intended to have them" is similarly inapt. Br. 32 (quoting Comment, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government,* 53 U. Chi. L. Rev. 1026, 1043 (1986)). The undisputed effect of estoppel in this case would be to give respondent benefits for a year in which he earned more than the specific limit established by Congress as a condition to the receipt of such benefits.

(Br. 28-34) and as this Court has recognized in similar cases, the solutions lie elsewhere—not in the courts but in Congress. See *Guidry* v. *Sheet Metal Workers Pension Fund,* No. 88-1105 (Jan. 17, 1990), slip op. 10; *INS* v. *Pangilinan,* 486 U.S. 875, 883-885 (1988).[9] That conclusion, of course, does not disable the courts from recognizing detrimental reliance when it is mandated by the Constitution[10] or by the terms of the statute at issue.

3. Respondent's efforts (Br. 37-49) to characterize this case as involving especially reprehensible government conduct and exceptional deprivation ring hollow. As we have already explained (Br. 44-47), even if estoppel could be

[9] In fact, Congress's most recent confirmation of this role is its action to remedy the denials of citizenship at issue in *INS* v. *Pangilinan,* 486 U.S. 875 (1988), and *INS* v. *Hibi,* 414 U.S. 5 (1973). See Filipino World War II Veterans' Naturalization Act, H.R. 525, 101st Cong., 1st Sess. (passed House, Nov. 13, 1989 (135 Cong. Rec. H8480 (daily ed. Nov. 13, 1989)); pending in Senate).

For recognition of the role of legislation in this area, see Schwartz, *Estoppel and Crown Privilege in English Administrative Law,* 55 Mich. L. Rev. 27, 37-38 (1956) (discussing provision generally prohibiting administrative sanctions given reliance on official misadvice); Berger, *Estoppel Against the Government,* 21 U. Chi. L. Rev. 680, 682 (1954) (commenting on similar Senate proposal); Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law,* 53 Colum. L. Rev. 374 (1953) (similar); Note, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?,* 56 St. John's L. Rev. 114, 135 (1981) (discussing "plethora" of proposed and enacted bills promoting fair dealing by government agencies).

[10] Perhaps in response to our argument about the force of the Constitution itself in dealing with detrimental reliance (Gov't Br. 39-43), respondent half-heartedly suggests (Br. 46 n.27) that his case may raise a question of procedural due process. No such claim has previously been raised and for good reason: as stated in our opening brief (at 43), a negligent action such as the misrepresentation in this case does not raise questions of procedural or substantive due process.

applied against the government, nothing in this case would justify such an extreme step.

At the outset, we must object to respondent's unwarranted claims of agency misconduct. The record reflects that in 1986 a Navy personnel specialist misinformed respondent of current law, and gave him a copy of part of an OPM Federal Personnel Manual letter containing outdated information. (Petitioner was again misinformed by a Navy employee in 1987, but did not of course rely on that misrepresentation in accepting work during 1986.) The record does not support the contention that OPM itself was at fault for the mistake, much less that it had "maintained a blatantly erroneous position for years" or had deliberately supplied the public with misinformation. Resp. Br. 49, 35-36. Rather, the public record establishes that OPM timely published letters and supplements to the FPM detailing the 1982 amendment.[11] There is no indication that OPM failed to use its regular distribution system (distribution of all FPM material to the Navy is done in bulk to a Navy distribution point in Philadelphia) to dis-

[11] OPM issued the letter given respondent in 1981. See FPM Letter 831-64, Att. 4, at 2 (Apr. 3, 1981). (The attachment is reproduced at Gov't Br. App. 1a-3a.) Later that year, OPM began revising its supplement on retirement, alerting FPM subscribers to use Letter 831-64 until later installments were received. See FPM Supp. 831-1, Inst. 31, at 1 (Sept. 1, 1981). Upon Congress's amendment of 5 U.S.C. 8337(d), OPM immediately published news and explanation of the amendment before its effective date on January 1, 1983, and reiterated that explanation in a retirement supplement eight months later. See FPM Letter 831-75, at 5 (Nov. 4, 1982); FPM Letter 831-78 (revised Supp. 831-1), at 1, Att. 1 at 18 (June 23, 1983). (Copies of these letters have been lodged with the Court.)

Thus, although FPM Letter 831-64 was not formally superseded until 1989, subsequent letters made clear that it was effectively obsolete as of 1983. See FPM Chap. 171-6, para. 2-7 (June 10, 1986) (later issued information supersedes any earlier instructions in conflict).

seminate these updates. Rather, it appears that the staff of the Navy Public Works Center in San Diego simply failed correctly to file the updates, and thus erroneously gave out the misinformation.[12]

a. Respondent argues (Br. 40-46) that he reasonably relied on the outdated information furnished to him. However, respondent here obtained incorrect information not, as he asserts (Br. 20), from OPM (the agency responsible for administrating the Civil Service Retirement Act), but from Navy personnel staff. The hand-out, while carefully written to explain the law before amendment, was obviously not an individualized response when given respondent. Compare *Community Health Services,* 467 U.S. at 65. And, the information was clearly contradicted by the plain terms of the statute.

There is no "reasonable reliance" warranting estoppel if a party "with reasonable diligence * * * could acquire the knowledge [exposing the misrepresentation] so that it

[12] We note also that the FPM manual and supplementing material is not "[OPM's] main channel of communications with annuitants." Resp. Br. 49; see also *id.* at 13. While OPM may include attachments to FPM issuances that can be passed out to current government employees, the FPM is explicitly designed for and distributed to federal personnel officers. See FPM Introduction, Inst. 348, at 1 (Mar. 17, 1989); FPM Chap. 171-5, paras. 2-1, 2-3 Inst. 332 (June 10, 1986). Compare *PICCO, supra,* where the Court stressed that the public had a right to depend on a published regulation. See 411 U.S. at 674.

Rather than using the FPM, OPM communicates directly with its annuitants. Respondent thus received from and returned to OPM each year an annual income report form. (Respondent is mistaken in claiming (Resp. Br. 45 n.26) that under *Jones* v. *OPM,* 37 M.S.P.B. 99, 102 (1988), OPM may have had an affirmative statutory obligation to notify annuitants about the earning capacity amendment. On remand, the administrative judge in *Jones* confirmed that there is no such duty. *Jones* v. *OPM,* No. AT08318710630-1, at 4 (M.S.P.B. Oct. 18, 1988).)

would be negligence on his part to remain ignorant." See *Community Health Services,* 467 U.S. at 59 n.10 (quoting 3 J. Pomeroy, *Equity Jurisprudence* § 810, at 219 (S. Symons 5th ed. 1941)). We have shown (Br. 44-45) that it is not unreasonable to expect citizens to use the published United States Code to confirm important information; this Court has repeatedly and recently so ruled. See, *e.g., Community Health Services,* 467 U.S. at 63. Indeed, the government could not operate if it could not generally rely on publication in the U.S. Code and the Code of Federal Regulations to serve as notice of the requirements of the law.[13]

Respondent's suggested alternative (Br. 43, 44) is to adopt an approach that would evaluate "all relevant factors in a given case to determine what degree of legal sophistication was reasonable" and would assume "[s]ome degree of presumed knowledge * * * [that] will have a different significance in each case – with the different circumstances of each case determining its relative importance." This open-ended approach is an invitation to litigation; indeed, it would be difficult if not impossible to apply in any consistent and predictable way. It is, for example, quite likely that when Ms. Hansen applied for "mother's insurance benefits," she had scant legal knowledge of the Social Security Act. See *Hansen,* 450 U.S. at 786. Likewise, the petitioner's mother in *Montana* v. *Kennedy,* 366 U.S. 308 (1961), may well not have had access to the United States Code in Italy. Respondent's approach invites the application of estoppel in these and countless other cases. In the

[13] The duty of citizens to know the law underlies the use of publication as notice in a variety of situations. See, *e.g., Atkins* v. *Parker,* 472 U.S. 115, 130-131 (1985); *Texaco, Inc.* v. *Short,* 454 U.S. 516, 531-532 (1982); *Anderson National Bank* v. *Luckett,* 321 U.S. 233, 243 (1944); *North Laramie Land Co.* v. *Hoffman,* 268 U.S. 276, 283 (1925).

end, the results may well be less fair and more arbitrary than under the long-established rule that, unless otherwise required by the terms of the statute or by the Constitution, all citizens are charged with knowledge of the law.

b. Respondent admits (Br. 11, 35) that "run-of-the-mill" mistakes by government employees do not amount to "affirmative misconduct" sufficient to estop the government. In this case, the fact that respondent lost approximately $3,993 in reliance on the negligent mistake of a Navy personnel specialist does not make that mistake extraordinary. Indeed, the failure of an employee correctly to file an FPM letter or to keep a complicated manual in order is as routine an error as one might imagine. It is manifestly less egregious than the conduct at issue in such cases as *Montana* and *INS* v. *Hibi,* 414 U.S. 5 (1973).

The courts of appeals today are well aware that no appellate court decision applying estoppel against the government has ever been upheld by this Court, and they have repeatedly expressed the difficulties of acting in this area. See, *e.g., Akbarin* v. *INS,* 669 F.2d 839, 842-843 (1st Cir. 1982); *Home Savings & Loan Ass'n* v. *Nimmo,* 742 F.2d 585, 586 (10th Cir. 1984); *Chien-Shih Wang* v. *Attorney General,* 823 F.2d 1273, 1276 (8th Cir. 1987). Adoption of respondent's argument would change all this: if the error here qualifies as a mistake of such magnitude that the courts must disregard the requirements imposed by Congress, then estoppel of the government, with all of its inherent problems on the levels both of principle and practice, may well become a commonplace event.

In our view, the orderly and proper administration of justice is far better served by limiting remedies for detrimental reliance to those occasions on which such a remedy is warranted by the relevant statute or required by the Constitution. That course would avoid grave intrusion into the legislative sphere; it would forestall the great ex-

pense to the government of defending against claims easily made and difficult to disprove; and it would avert the heavy and perhaps unsustainable burden on the courts of articulating acceptable standards for excusing compliance with the requirements of law.

* * * * *

For the foregoing reasons, and those stated in our opening brief, the judgment below should be reversed.

Respectfully submitted.

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Solicitor General

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